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Supreme Court of the United States

OCTOBER TERM, 1954

No. 204

SOCIETY FOR SAVINGS IN THE CITY OF CLEVELAND, APPELLANT,

vs.

JOHN W. PECK, TAX COMMISSIONER OF OHIO

APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

FILED JULY 12, 1954

PROBABLE JURISDICTION NOTED OCTOBER 14, 1954

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

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SOCIETY FOR SAVINGS IN THE CITY OF CLEVELAND, APPELLANT,

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JOHN W. PECK, TAX COMMISSIONER OF OHIO

APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

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[fols. 1-5] **IN THE SUPREME COURT OF OHIO**

No. 33,523

SOCIETY FOR SAVINGS IN THE CITY OF CLEVELAND, Appellee

vs.

JOHN W. PECK, TAX COMMISSIONER OF OHIO, Appellant

ORDER ALLOWING APPEAL—Filed June 3, 1954

Society for Savings in the City of Cleveland having made and filed its petition praying for an appeal to the Supreme Court of the United States from the final judgment of this Court in this cause entered on March 10, 1954, and having presented its assignment of errors and prayer for reversal and its statement as to the jurisdiction of the Supreme Court of the United States on appeal pursuant to the statutes and rules of the Supreme Court of the United States in such cases made and provided,

[fols. 6-7] Therefore, it is hereby ordered that said appeal be and the same is hereby allowed as prayed for.

It is further ordered that the amount of the appeal bond be and the same is hereby fixed in the sum of $250.00, with good and sufficient surety, and shall be conditioned as may be required by law.

It is further ordered that citation shall issue in accordance with law, and that the clerk of this Court shall prepare and certify a transcript of the record, proceedings, and judgment in this cause and transmit the same to the Supreme Court of the United States, so that the same may be deposited with said Court within forty (40) days of this date.

Carl V. Weygandt, C. J.

Dated June 3, 1954.

[fol. 8] IN THE SUPREME COURT OF OHIO

No. 33,523

[Title omitted]

ASSIGNMENT OF ERRORS AND PRAYER FOR REVERSAL—Filed June 3, 1954

Society for Savings in the City of Cleveland, appellee in the above entitled cause, in connection with its appeal to the Supreme Court of the United States, hereby files the following Assignment of Errors upon which it will rely in its prosecution of said appeal from the final judgment of the Supreme Court of Ohio entered on March 10, 1954; application for rehearing denied, March 31, 1954.

The Supreme Court of Ohio erred:

[fols. 9-39] 1. In holding that the Tax Commissioner of Ohio, in ascertaining and assessing for taxation the value of the property representing the capital employed by an incorporated mutual savings bank, not divided into shares, pursuant to Sections 5408 and 5412, Ohio General Code, is not required, by the force of United States Code, Title 31, Section 742 (Revised Statutes, Sec. 3701), Article I, Section 8, Clause 2 of the Constitution of the United States, and Article VI, Clause 2 of the Constitution of the United States, to eliminate from the tax base, the value of federal securities owned by such institution; and in holding that the Ohio statutes as so interpreted are not violative of the federal statute and Constitution as aforesaid.

3. In holding that to so tax a mutual savings bank, construing the tax as assessed against property of the bank's depositors, without right of reimbursement by the bank against its depositors, is not a deprivation of property without due process of law, under the Fourteenth Amendment of the Constitution of the United States.

Wherefore, appellee, Society for Savings in the City of Cleveland, prays that the final judgment of the Supreme Court of Ohio be reversed, and for such other relief as the

Supreme Court of the United States may deem fit and proper.

Charles W. Sellers, 1100 National City Bank Bldg., Cleveland 14, Ohio, and Jerome C. Fisher, 1100 National City Bank Bldg., Cleveland 14, Ohio, Thompson, Hine & Flory, 1100 National City Bank Bldg. Cleveland, Ohio, of Counsel. Counsel for appellee Society for Savings in the City of Cleveland.

[fol. 40] BEFORE THE DEPARTMENT OF TAXATION

In the Matter of the Application of Society for Savings in the City of Cleveland, Cleveland, Ohio a Financial Institution, for a Certificate of Abatement for the Alleged Overpayment of Intangible Taxes for the Years 1947 Through 1951.

APPLICATION FOR CERTIFICATE OF ABATEMENT—Filed June 3, 1952

Tax Commissioner
Ohio Department of Taxation
Columbus, Ohio:

Applicant, Society for Savings in the City of Cleveland, is an incorporated financial institution, a mutual savings bank, the capital of which is not divided into shares, and which has no capital stock. It was originally incorporated pursuant to a special act of the Ohio legislature passed in 1849 (47 O. L. 279), supplemented by acts of the Ohio legislature passed in 1866 (63 O. L. 62) and in 1877 (74 O. L. 26). It reincorporated in the year 1933, as a mutual savings society, pursuant to Sections 710-148a to 710-148l, inclusive, of the Ohio General Code, by filing its certificate of election pursuant to Section 710-148k of the Ohio General Code. Applicant's office and place of business is located at 127 Public Square, Cleveland, Ohio.

Application is hereby made for issuance of a certificate of abatement pursuant to Section 1464-3, Ohio General Code, in the amount of $126,115.96.

[fol. 41] Applicant's financial institutions tax returns, for

the years 1947 to 1951, inclusive, each included in its statement of resources under Item 3 thereof, the book value of United States bonds, treasury notes, certificates of indebtedness and treasury bills owned by applicant. The amounts of such obligations of the United States, so included in the tax returns for each year were as follows:

Year	Book Value of United States Obligations
1947	$105,468,000.00
1948	102,260,000.00
1949	99,238,000.00
1950	107,219,000.00
1951	97,930,785.40

Including book value of United States obligations as aforesaid, the book value of applicant's capital employed, as showed in the tax returns for the several years referred to, was as follows:

Year	Book Value of Capital Employed
1947	$12,760,230.00
1948	12,797,790.00
1949	11,849,160.00
1950	12,421,520.00
1951	13,229,280.00

The financial institutions tax assessed against, and paid by, applicant in respect of its capital employed (exclusive of the tax on deposits) or each said years, and the dates of payment are as follows:

[fol. 42]

Year	Amount of Tax Paid	Date of Payments
1947	$25,520.46	June 12, 1947
1948	25,595.58	June 28, 1948
1949	23,698.32	June 28, 1949
1950	24,843.04	June 29, 1950
1951	26,458.56	July 18, 1951
Total	$126,115.96	

The book value of the United States obligations, owned by applicant as aforesaid, should have been excluded from its resources for purposes of computing the financial institutions tax, for the reason that said obligations of the United States, owned by applicant may not, pursuant to the terms and provisions of the Constitution of the United States and Title 31, Section 742 of the United States Code be taxed by the state of Ohio. Such exclusion would have left none of applicant's capital employed subject to the tax, for each of the years 1947-1951, inclusive. Consequently, the entire amount of tax paid for said years as aforesaid, to wit, $126,115.96, was overpaid, and applicant is entitled to a certificate of abatement for the same.

Society for Savings in the City of Cleveland, by Thompson, Hine & Flory, Attorneys.

[Duly verified.]

[fol. 43] BEFORE THE DEPARTMENT OF TAXATION

ORDER DENYING APPLICATION—Dated July 30, 1952

This day the application of Society for Savings in the City of Cleveland, Cleveland, Ohio, a financial institution, for a certificate of abatement for the alleged overpayment of intangible taxes for the years 1947 through 1951 came on to be considered.

The taxpayer filed a timely application for a certificate of abatement for the years above mentioned contending that the taxes for said years were overpaid because the assessments included obligations of the United States. The Tax Commissioner finds that the application is based upon the provisions of Section 742, Title 31, United States Code.

Upon consideration of all the available evidence the Tax Commissioner finds that there has been no overpayment for the years in question and it is therefore ordered that this application be and the same hereby is denied.

Department of Taxation, John W. Peck, Tax Commissioner.

[fol. 44] BEFORE THE DEPARTMENT OF TAXATION

AGREED STATEMENT OF FACTS—Filed November 12, 1952

The parties hereto, by their counsel duly authorized, hereby stipulate and agree that the following facts are true:

Appellant, Society for Savings in the City of Cleveland, is an incorporated financial institution, a mutual savings bank, which has no capital stock. It was originally incorporated pursuant to a special act of the General Assembly of Ohio passed in 1849 (47 O. L. 279), supplemented by acts passed in 1866 (63 O. L. 62) and in 1877 (74 O. L. 26). It reincorporated in the year 1933, as a mutual savings society, pursuant to Sections 710-148 a to 710-148 l, inclusive, General Code, by filing its certificate of election pursuant to Section 710-148 k, General Code. Appellant's office and place of business are located at 127 Public Square, Cleveland, Ohio.

Each of appellant's financial institution tax returns for the years 1947 to 1951, inclusive included in its statement of resources under Item 3 thereof, the book value of United States bonds, treasury notes, certificates of indebtedness and treasury bills owned by appellant. The amounts of such obligations of the United States so included in such tax returns for each of such years were as follows:

Year	Book Value of U. S. Obligations
1947	$105,468,000.00
1948	102,260,000.00
1949	99,238,000.00
1950	107,219,000.00
1951	97,930,785.40

[fol. 45] The tax returns filed by appellant, Society for Savings in the City of Cleveland, for the years here involved are true statements as to the books of account of the appellant for said years.

The amounts of the taxes assessed pursuant to the provisions of Section 5412, General Code, (excluding the taxes assessed on taxable deposits) for each of such years were

as follows. Such amounts were paid by the appellant on the dates indicated:

Year	Amount of Tax	Date of Payments
1947	$25,520.46	June 12, 1947
1948	25,595.58	June 28, 1948
1949	23,698.32	June 28, 1949
1950	24,843.04	June 29, 1950
1951	26,458.56	July 18, 1951
Total	$126,115.96	

Each party hereto reserves the right to object to the materiality or relevancy of any of the facts above stipulated, and each party reserves the right to offer additional evidence upon the trial of this case.

Thompson, Hine & Flory, by Jerome C. Fisher, Attorneys for Appellant. C. William O'Neill, Attorney General, Joseph S. Gill, First Assistant Attorney General, Attorneys for Appellee, Tax Commissioner of Ohio.

[fol. 46] BEFORE THE BOARD OF TAX APPEALS

[Title omitted]

NOTICE OF APPEAL—Filed August 21, 1952

Society for Savings in the City of Cleveland, appellant, hereby gives notice of its appeal to the Board of Tax Appeals from the findings of the Tax Commissioner, made on the thirtieth day of July, 1952. A true copy of the notice of said findings, sent by the Tax Commission to appellant, is attached hereto and incorporated herein by reference.

Appellant claims that said findings are erroneous in that they determine that there has not been any overpayment by the appellant of its intangible taxes for the years 1947 through 1951. The assessments of said taxes, as the findings of the Tax Commissioner correctly infer, included in the valuation of appellant's capital employed, obligations of

the United States owned by appellant. The value of such obligations of the United States, should have been excluded, in assessment of the tax, because the Constitution of the United States, as interpreted by the Supreme Court of the United States, and the provisions of Section 742, [fol. 47] Title 31, United States Code, require or provide that obligations of the United States shall be exempt from taxation by any state. Such exemption, if accorded to obligations of the United States owned by appellant, would have left none of appellant's capital subject to tax by the state of Ohio for the years in question. Consequently, the entire amount of taxes paid to the state of Ohio, for the years 1947 through 1951, namely $126,115.96, was overpaid, and appellant is entitled to a certificate of abatement for the same pursuant to Section 1464-3, Ohio General Code; and the findings of the Tax Commissioner were erroneous as a matter of law.

Thompson, Hine & Flory, Edgar P. Stocker, of Counsel, Attorneys for Appellant.

[fol. 48] BEFORE THE BOARD OF TAX APPEALS

TRANSCRIPT OF PROCEEDINGS

Examiner Ford: Before the Board of Tax Appeals, Department of Taxation, state of Ohio. Society for Savings of the City of Cleveland, appellant, against John W. Peck, Tax Commissioner of Ohio appellee, Case Number 22464. Appeal filed herein under date of August 26, 1952, from a final order of the Tax Commissioner under date of July 30, 1952, denying application for a certificate of abatement theretofore filed by the appellant on an alleged overpayment of taxes in the aggregate amount of $126,115.96, extended against surplus, undivided profits and general reserves of the appellant as reported by the appellant in its tax returns as a financial institution for the tax years 1947 to 1951 inclusive; which claim for overpayment of taxes of said amount is based upon the further claim that there were included in the resources and in resulting tax bases as returned by the company for said tax years, the government bonds and other government obligations which it is

claimed are not subject to taxation by the state of Ohio.

Case heard before William J. Ford, attorney examiner, Board of Tax Appeals, at the hearing room of the board, Columbus, Ohio, on November 12, 1952, pursuant to assignment.

Counsel for the appellant and the counsel for the appellee will at this time enter their appearances by name and by office address.

Mr. Fisher: Attorney for the appellant, Jerome C. Fisher, National City Building, Cleveland, Ohio.

Mr. Gill: Any other appearances, Mr. Fisher?

Mr. Fisher: Edgar P. Stocker, same address.

[fol. 49] Mr. Gill: Joseph S. Gill, Hugh A. Sherer, Mr. Everett Krueger, State House Annex, Columbus, attorneys for the Tax Commission.

Examiner Ford: Proceed, Mr. Fisher.

Mr. Fisher: I would assume, Your Honor, that you would like as brief as possible a statement of the issue presented in the case, and I shall make it very brief. The Society for Savings, the appellant here, is a mutual savings society originally incorporated by a special act of the legislature in 1849. In the year 1933 it was reincorporated as a mutual savings society pursuant to the recently passed Sections 710-148A to L of the General Code. It has no capital stock.

It has been stipulated, and in a moment the stipulation will be offered, that the tax returns filed by the Society for Savings and a part of the record before the Tax Commissioner are two statements of the books of account of the appellant for the years 1947 to 1951 which are here involved. It is also stipulated that in those years the Society for Savings held United States bonds and other obligations of the United States in the amounts shown in the stipulation, which being long and large figures, I won't here read; suffice to say they are substantially larger figures than the surplus undivided profits and reserves of the Society for Savings for those respective years.

Before I offer the stipulation, I might say, as it has already been stated by the court, the reason for the petition for abatement here is that the tax is assessed on the capital employed in the business including reserves, undivided

profits, and surplus; and as assessed by the Commissioner is a tax on United States obligations owned by the bank. Under what we believe to be long established constitutional principles governing the relationship between the states [fol. 50] and the United States government, due to the provision of the United States Constitution and a statute of the United States Congress and certain decisions of this board, and of the Ohio Supreme Court and of the United States Supreme Court, such a tax on government obligations may not be assessed and, therefore, we should have the abatement claimed. I now offer the stipulation.

Examiner Ford: Wait a minute. We have not got to that yet. Have you finished your statement?

Mr. Fisher: I have finished my statement.

Examiner Ford: Do you care to make a statement, Mr. Gill?

Mr. Gill: I have no quarrel, Mr. Ford, with the factual statements Mr. Fisher has made concerning the appellant, the Society for Savings, and most of the factual matter will be stipulated before the board. It can be said briefly on behalf of the Department of Taxation and the Tax Commissioner that it is our contention that this is truly a mutual savings society, that it has nothing in it but money belonging to depositors, that there is no capital as such, and that there has been no assessment made against the capital which, of course, we will brief after the case has been heard and submitted.

Examiner Ford: Now, of course, before the board, a claim was made that there had been no abatement of taxes in each and all of the years in question. I notice that the Tax Commissioner disposes of that contention in the last paragraph of the order of entry as follows: "Upon consideration of all the available evidence the Tax Commissioner finds that there has been no overpayment for the years in question and it is therefore ordered that this application in the same year is denied."

[fol. 51] The transcript which has been certified to the Board of Tax Appeals by the Tax Commissioner relating to this application for certificate of payment does not set forth any evidence which might have been referred to by the Tax Commissioner's order of entry. Do you know anything

about what payments were before the Tax Commissioner at that time?

Mr. Gill: So far as I know it was the copies of the tax return which are in your file, Mr. Ford, and his decision and his interpretation of the law applicable thereto. From my conversation with the Tax Commissioner, I know of no other evidence which was considered.

Examiner Ford: The point to my question was whether or not there was any evidence extraneous to those tax returns in the transcript. As far as you know there was no other thing?

Mr. Gill: So far as I know there was not, sir.

Examiner Ford: You may proceed with your evidence.

Mr. Fisher: I want to offer the stipulations signed by counsel for both parties. We offer the certified copy of the certificate of election and incorporation of the Society for Savings under Section 710-148. Then I have about two questions to ask after these have been recorded.

Examiner Ford: Now as to the agreed statement of facts, does counsel want that read and to become a part of the regular hearing, or do you want it to go in as an exhibit?

Mr. Gill: I have no feeling on the mat-er either way. Does the board have preference?

Examiner Ford. I think it does. I think it will be read into the record. I see it will be signed by counsel here and [fol. 52] you have reached an agreement that the statement may be read into the record at this time for the appellant.

* * * * * * *

Examiner Ford: You may proceed.

Mr. Fisher: I want to ask two or three questions of Mr. Johnson, the comptroller.

Rensselaer R. Johnson, being first duly sworn, testified as follows:

Direct examination.

By Mr. Fisher:

Q. Will you state your name and address?

A. Rensselaer R. Johnson. My address; you want my home address? 20845 Kinsman road, Shaker Heights, Ohio.

Q. Mr. Johnson, you are comptroller for the appellant here, the Society for Savings in the city of Cleveland?

A. Yes, sir.

Q. Is it within your knowledge from the books which were in your control as to about how many depositors there were in the Society for Savings at the beginning of the year 1947? If so, will you state the number?

A. Approximately 185,000 depositors at the beginning of 1947.

Q. Would you state the same figure for the beginning of 1948?

A. The beginning of 1948 it was 193,000 approximately.

Q. At the beginning of 1949?

A. It was 201,000

Q. And at the beginning of 1950?

A. It was 211,000.

Q. Beginning of 1951?

A. 226,000.

Q. Mr. Johnson, do you know and can you tell us whether there are any substantial changes in the personnel constituting those depositors? In other words, in these years do some depositors close their accounts and cease to be depositors, and do new persons become depositors?

A. Yes, we have new accounts opened every year and old [fol. 53] accounts are closed.

Examiner Ford: What was that answer?

The Witness: New accounts—several thousand new accounts are opened each year and several thousand closed each year.

By Mr. Fisher:

Q. Can you give us an approximation, an average rough of the number of closed accounts and of new accounts in each of these years?

A. They vary from year to year. The approximate figure—I would say we close probably 20,000 accounts a year and open a few more than that because there is an increase each year.

Mr. Fisher: That is all.

Mr. Gill: I have no question, Mr. Johnson.

Examiner Ford: What is your connection with the bank, Mr. Johnson?

The Witness: I am comptroller. Is that all there is?

Examiner Ford: That is all.

(Witness excused.)

Mr. Fisher: Your Honor, I think it should be understood with Mr. Gill that the record before the Tax Commissioner is part of the record in this case. There has been some question raised in the case.

Mr. Gill: Yes, do you want any introduction made of the record which is before the board, Mr. Ford?

Examiner Ford: Do you mean these transcripts that came up here?

Mr. Gill: That is right.

Examiner Ford: The law requires it and the Tax Commissioner presumably conforms to the law.

[fol. 54] Mr. Gill: I might say in all aspects, Mr. Ford, but we will get to that later.

Mr. Fisher: We rest our case.

Examiner Ford: As a part of the appellant's case, Appellant's Exhibit A offered in evidence and without objection the same is received.

(Appellant's Exhibit A was marked for identification and received in evidence.)

Mr. Gill: Mr. Ford, I have here a photostatic copy of a record. It has been agreed with Mr. Fisher, who will speak for himself in a moment, that counsel for the appellant stipulate and agree that this is a true copy of a record kept in the office of the auditor of state pursuant to law. This particular record refers to the year 1877 and pursuant to an act passed in 74 Ohio Laws, 26, and another act passed in 74 Ohio Laws, 72, later codified as Sections 3814 to 3821 of the Revised Statutes. It was required that this record be kept by the auditor of state. I am submitting it in this hearing pursuant to the provisions of Section 12102-26 of the General Code which is the Uniform Official Records as Evidence Act which provides that these matters shall be admissible when they have in fact been kept by state officials pursuant to authority vested in them by law. According to the provisions of that act, copies of this document have

been served on Mr. Fisher, counsel for the appellant, and at this time I am offering this record referring to the year 1877 as Appellee's Exhibit 1.

(Appellee's Exhibit 1 was marked for identification.)

Mr. Fisher: Your Honor, we have agreed with Mr. Gill that a photostat may be offered as if it were the original so there is no objection to the form of the exhibit. However, we do now object to its receipt in evidence on the [fol. 55] ground that it is neither material nor relevant to this case, being a report as to a year some seventy years earlier than any question involved in this case.

Examiner Ford: The board will not rule until after you have a chance to cross examine.

Mr. Gill: I should like to make this statement in reply to his objection, Your Honor, and the board may want to rule on this, Your Honor. It is our contention that there is no capital. It is truly a mutual savings bank, and in order to establish that fact throughout the history of the Society for Savings for the information of the board, I have gone back to the first report that I can find. This was the earliest year which they were required to make reports. I have certain other reports which I have taken at key periods to show the board that this has consistently been treated as depositors' money. This goes to the legal question involved in this case. Before we are through, I believe it will appear that this is material and relevant.

Will you please mark this as Appellee's Exhibit 2?

(Appellee's Exhibit 2 was marked for identification.)

Mr. Gill: I am offering now, Mr. Ford, under the same stipulation Appellee's Exhibit 2, having been submitted to Mr. Fisher for examination, the report of the Society for Savings for the year 1907.

Examiner Ford: 19 what?

Mr. Gill: 1907. I am offering it for this purpose: 1907 was the last year in which the auditor of state was required to keep these records. I am offering this simply to show the continuity of the reports and to establish that in that particular year the financial structure of the company was as it has been throughout its history.

I presume the same objection applies to that.

[fol. 56] Mr. Fisher: We made the same agreement as to the form so we do not object to the form of the exhibit, but object on the ground that it is immaterial and irrelevant.

Examiner Ford: Well, speaking with respect to Appellee's Exhibits 1 and 2, that is both of these exhibits, is there any question about the competency of the exhibit aside from the relevancy and materiality?

Mr. Fisher: No, Your Honor, we have stipulated as to their competency but we can't see that they have any bearing on the issue of this case.

Examiner Ford: In other words, your objection to the exhibits is with respect to their alleged want of materiality and relevancy.

Mr. Fisher: Exactly.

Mr. Gill: Will you mark this as Appellee's Exhibit 3, please?

(Appellee's Exhibit 3 was marked for identification.)

Mr. Gill: I am offering the Appellee's Exhibit 3, Mr. Ford, which is an excerpt from the annual report of the superintendent of banks made in the year 1908. It is offered for the same purpose as the Exhibit Number 2. This is the first report made by the superintendent of banks pursuant to the provisions of Section 710-18 of the Ohio General Code, which section is still in existence and shows that the continuity of the reports from the auditor's office to the superintendent of banks' office was picked up; and also for the purpose of showing that the financial structure of the appellant, Society for Savings, was the same as in other years.

Mr. Fisher: We admit the propriety of offering the copy. There is no objection to the form and use of a photostat. [fol. 57] We make the same objection that it is irrelevant and immaterial and, therefore, should be excluded.

Mr. Gill: Mark this Appellee's Exhibit 4, please.

(Appellee's Exhibit 4 was marked for identification.)

Mr. Gill: I am offering here the Appellee's Exhibit 4 which is an excerpt from the annual report of the division of banks for the year 1933. This financial report is particularly relevant for the issues here involved because you will recall, Mr. Ford, that 1933 was the year in which the

appellant, Society for Savings, was reorganized, which is now codified as Section 710-148A to L inclusive. It will be noted from this exhibit that in that year of the reorganization no change in the capital structure, which we contend is relevant to this matter, was made by the appellant, Society for Savings.

Mr. Fisher: Same objection.

Mr. Gill: Will you please mark this Appellee's Exhibit 5?

(Appellee's Exhibit 5 was marked or identification.)

Mr. Gill: I am offering here, Mr. Ford, the Appellee's Exhibit Number 5, an excerpt from the annual report of the division of banks for the year 1934. I offer it to show particularly that during the year 1934 the appellant, Society for Savings, presumably issued and showed on its reports three million dollars worth of capital notes or debentures.

Same objection for Mr. Fisher.

Mr. Fisher: We have agreed on the use of the copy but object to the materiality and relevancy.

Mr. Gill: Will you please mark this as Appellee's Exhibit 6?

(Appellee's Exhibit 6 was marked for identification.)

Mr. Gill: I am offering as the Appellee's Exhibit Number 6 an excerpt from the annual report of the division of banks [fol. 58] for the year 1942. I offer it particularly to show that on December 31, 1942, the appellant, Society for Savings, had outstanding eight hundred thousand dollars of capital notes or debentures.

Mr. Fisher: Same agreement as to form and same objection as to materiality and relevancy.

Mr. Gill: Will you mark this as Appellee's Exhibit Number 7, please?

(Appellee's Exhibit Number 7 was marked for identification.)

Mr. Gill: I am offering as the Appellee's Exhibit Number 7, Mr. Ford—

Examiner Ford: I take it so far as the question of competency is concerned you are offering these under the Uniform Evidence Act that was passed by the legislature.

Mr. Gill: Their admissibility comes squarely under Section 12102-26.

Examiner Ford: I understand that counsel is not objecting to these exhibits with respect to the admissibility as far as the uniform evidence rule is concerned, which was passed by the legislature, but your sole objection is on the grounds of relevancy and materiality.

Mr. Fisher: Yes, that is a correct statement of our position.

Mr. Gill: This is an excerpt from the annual report of the division of banks for the year 1943. It is introduced specifically to show that on December 31, 1943, the appellant, Society for Savings, had outstanding no capital notes or debentures and presumably had during that year paid off the last of its outstanding capital notes or debentures.

I have no other evidence, Mr. Ford. We rest our case.

[fol. 59] Examiner Ford: Well, before you rest, we better dispose of these exhibits. Although speaking personally and offhand, I am having some difficulty in seeing the relevancy of some of the exhibits, but I think that is a question to be passed on by the board and inasmuch as I am hearing this case only as an examiner, it is the order of the board through me as examiner at this time that objection of counsel to the admission of the exhibits be overruled so far as this hearing is concerned, but that the objection of counsel to each and all of these exhibits be reserved, and it is hereby reserved for the consideration of the board solely on the question as to whether or not they are relevant and material on a consideration of the issues in this case. For this purpose and for this end only the objection of counsel to the exhibits and each of them is overruled and exceptions of counsel for the appellant noted.

The exhibits are received in evidence subject to the reservation of the Board of Tax Appeals upon its consideration of the case on its merits.

(Appellee's Exhibits Number 1, 2, 3, 4, 5, 6, and 7 were received in evidence.)

Examiner Ford: Do you rest, Mr. Gill?

Mr. Gill: Yes, sir.

Examiner Ford: Appellant rests and appellee rests. There being no rebuttal evidence, case is submitted.

(Case submitted at 10:55 a. m.)

BEFORE THE BOARD OF TAX APPEALS

[fol. 60] ENTRY—Dated March 2, 1953

This cause and matter came on to be considered by the Board of Tax Appeals upon an appeal filed herein under date of August 21, 1952 by the appellant above named from a final order of the Tax Commissioner dated July 30, 1952 in and by which final order the Tax Commissioner denied appellant's application for a certificate of abatement for the alleged overpayment of intangible taxes for the years 1947 through 1951.

The cause was submitted on the notice of appeal, the Tax Commissioner's transcript for the years in question, an agreed statement of facts signed by counsel, the evidence presented to this board at a hearing upon the appeal, and briefs of counsel.

The notice of appeal, as filed with the Board of Tax Appeals, reads as follows:

* * * * * * *

The final order of the Tax Commissioner complained of reads as follows:

* * * * * * *

The agreed statement of facts filed with the Board of Tax Appeals under date of November 12, 1952, reads as follows:

* * * * * * *

The pertinent portion of General Code Section 1464-3 (2), by virtue of which the appellant filed its application for a certificate of abatement with the Tax Commissioner reads as follows:

> "* * *. On written application of any person, firm or corporation claiming to have overpaid to the treasurer of state, at any time within five years prior to [fol. 61] the making of such application but not prior to January 1, 1938, any tax payable under any law which the department of taxation is required to administer, or on his own motion, to investigate the facts and to

make, in triplicate, a written statement of his findings; and, if he shall find that there has been an overpayment, issue, in triplicate, a certificate of abatement, payable to the taxpayer or his or its assigns or legal representative and showing the amount of the overpayment and the kind of tax overpaid. * * *."

The question presented to us for solution in this case can be stated as follows:

Was the Tax Commissioner in error—(1) in not finding that the appellant had overpaid its intangible taxes for the years 1947 through 1951, and (2) in not issuing certificates of abatement to appellant as prayed for in its application?

Or, the question may be stated in another way, to wit: Was the Tax Commissioner in error in including in the tax base the value of federal securities owned by appellant in assessing, pursuant to Section 5412, General Code, the value of "property representing the capital employed by" appellant (a financial institution), the capital of which financial institution is not divided into shares?

The federal constitutional provision and the federal statutory enactment relied on by appellant read as follows:

Constitution of the United States, Article I, Section 8, Clause 2.

> "The congress shall have power * * * To borrow money on the credit of the United States; * * *."

United States Code, Title 31, Section 742 (Revised Statutes, Section 3701)

> "Except as otherwise provided by law, all stocks, bonds, treasury notes, and other obligations of the [fol. 62] United States, shall be exempt from taxation by or under state or municipal or local authority."

The taxation sections of the Ohio General Code involving financial institutions read as follows:

Section 5406:

> "The deposits required to be returned by financial institutions pursuant to this chapter include all deposits as defined by section 5324 of the General Code to

the extent that such deposits are made taxable by section 5328-1 of the General Code, excepting deposits belonging to the federal government or any instrumentality thereof; or deposits to the extent of advances or advance payments made under any contract entered into by the federal government or any instrumentality thereof for the production of materials or supplies or the furnishing of services pursuant to authority of any act to further the war effort; or deposits belonging to the state of Ohio or any county, municipal corporation, school district, township, or other subdivision thereof, or to any other financial institution, or to a dealer in intangibles or a domestic insurance company, or to an institution used exclusively for charitable purposes, or proceeds of loans which have been credited to the borrower but not disbursed, or advances by borrowers for the subsequent payment of specific obligations. If any deposit belonging to any of the classes required so to be returned consists in whole or in part of an amount representing uncollected checks and other uncollected items, credited thereto, one-half of the amount so represented shall be considered as withdrawable and to be so included in ar- [fol. 63] riving at the aggregate balance of taxable deposits, required so to be returned, whether or not the depositor is in fact permitted to make withdrawals against the amount so represented and credited."

Section 5407:

"The term 'financial institution' as used in this chapter includes every person who keeps an office or other place of business, in this state and engages in the business of receiving deposits, and of lending money, buying or selling bullions, bills of exchange, notes, bonds, stocks, or other evidences of indebtedness, with a view to profit. Provided that corporations or institutions organized under the provision of the act of congress, known as the federal farm loan act, approved July 17, 1916, and amendments thereto, and insurance companies, shall not be considered financial institu-

tions or dealers in intangibles within the meaning of this chapter."

Section 5408:

"All the shares of the stockholders in a financial institution, located in this state, incorporated or organized under the laws of the state or of the United States, the capital stock of which is divided into shares, excepting such as are defined as 'deposits' in section 5324 of the General Code, and all the shares of the stockholders in an unincorporated financial institution, located in this state, the capital stock of which is divided into shares held by the owners of such financial institution, and the capital employed, or the property representing it, in a financial institution the [fol. 64] capital of which is not divided into shares, or which has no capital stock, located in this state, shall be listed and assessed at the book value thereof, and taxed in the manner provided in this chapter."

Section 5409:

"The real estate of a financial institution shall be taxed in the place where it is located, in like manner as the real estate of persons is taxed; but the tax provided for in this chapter shall be in lieu of all other taxes on the other property and assets of such institution."

Section 5410:

"There shall be kept in the offices at all times where the business of such financial institution is transacted, a full and correct list of the names and residences of the stockholders therein, and the number of shares held by each, which, at all times during business hours, shall be open to the inspection of all officers who are or may be authorized to list or assess such shares for taxation, or to administer the laws relating to such assessment."

Section 5411:

"The cashier or other principal accounting officer of each incorporated bank, the secretary or other principal accounting officer of each other incorporated financial institution, the cashier, manager or owner of each unincorporated bank, and the manager, owner or owners of each other unincorporated financial institution, shall return to the department of taxation be- [fol. 65] tween the first and second Mondays of March, annually, a report exhibiting in detail, and under appropriate heads, the resources and liabilities of such institution at the close of business on the thirty-first day of December next preceding."

Section 5411-1:

"On or before the fifth day of December annually, the tax commission of Ohio shall fix the day as of which the taxable deposits in financial institutions shall be listed and assessed. The day so fixed shall be between the first and the thirtieth days of November both inclusive and the action of the commission shall be taken not more than five days after the day so fixed. Notice of such action shall be immediately given to each financial institution and to the auditor of each county by registered mail, and the date so fixed shall be printed or stamped on the forms of return to be made by all financial institutions. The dates herein fixed for the action of the commission are directory merely, and if through inadvertence or mistake such action is not taken at the time herein prescribed, or the notice herein required to be given to a financial institution or a county auditor is not duly given, the remaining requirements of this chapter and the validity of any assessment made hereunder shall not be affected thereby."

Section 5411-2:

"The report of each financial institution made pursuant to section 5411 of the General Code shall also show the aggregate balances of the taxable deposits

[fol. 66] of its depositors, in each county in which the institution maintained an office or offices for the receipt of deposits, at the end of business on the day fixed by the board of tax appeals pursuant to section 5411-1 of the General Code. The report shall show also the names and addresses of all depositors whose deposits were wholly withdrawn from such institution between the day so fixed and the date on which notice of the fixing thereof was received by such institution, or if no such notice was received then between the day so fixed and the first day of January next following, and the amount of the taxable deposits of each such depositor on the day so fixed."

Section 5412:

"Upon receiving such report the tax commissioner shall ascertain and assess all the taxable shares of such financial institution, or the value of the property representing the capital employed by such financial institution, not divided into shares, at the aggregate amount of the capital, the surplus or reserve fund and the undivided profits as shown in such report, and the amount of taxable deposits of such institution in each county in which the institution maintained an office or offices for the receipt of deposits. Such amounts shall be assessed in the name of such financial institution excepting that the amounts of taxable deposits wholly withdrawn from each such institution within the times mentioned in section 5411-2 of the General Code and separately set forth in such report shall be subtracted from the amount of taxable deposits so assessed and separately assessed in the names of such respective de- [fol. 67] positors. In the case of an incorporated financial institution all of whose shares constitute deposits as defined in section 5324 of the General Code such assessment of shares shall exclude the capital stock thereof as so shown but shall include the surplus or reserve and undivided profits so shown."

Section 5412-1:

"On or before the first Monday of May, annually, the tax commissioner shall certify to the auditor of state the assessment of each financial institution located in the state, showing separately the county in which the institution's principal office is located, and the amount or amounts of taxable deposits, if any, of branches in each county other than that in which such principal office is located, and to each county auditor the assessment of each taxable deposit separately assessed in the name of a depositor residing in his county. The auditor of state shall place the amount or amounts so certified on the intangible property tax list in his office. The county auditor shall place the amounts so certified on the classified tax list and duplicate of his county in the names of the depositors represented by such certificates.

"Any certificate of abatement issued pursuant to section 5464-3 of the General Code for the overpayment of the deposits tax or taxes imposed on shares of financial institutions or on capital employed by financial institution may be tendered by the payee or transferee thereof to the treasurer of state as payment for any taxes allocable to the county in which the claim for overpayment arose."

[fol. 68] Section 5638-1:

"Annual taxes are hereby levied on the kinds and classes of intangible property, hereinafter enumerated, on the intangible property tax list in the office of the auditor of state and duplicate thereof in the office of treasurer of state at the following rates, to wit:

"* * * deposits, two mills on the dollar; shares in and capital employed by financial institutions, two mills on the dollar; * * *."

Section 5672:

"Taxes assessed on non-withdrawable shares of stock, of a financial institution, shall be a lien on such shares from the first day of January in each year until they are paid.

It shall be the duty of every financial institution to collect the taxes due upon its shares of stock from the several owners of such shares, and to pay the same to the treasurer to state and any financial institution failing to pay the said taxes as herein provided, shall be liable by way of penalty for the gross amount of the taxes due from all the owners of the shares of stock, and for an additional amount of one hundred dollars for every day of delay in the payment of said taxes."

Section 5673:

"Such financial institution paying to the treasurer of state the taxes assessed upon its shares, in the hands of its shareholders respectively, as provided in the next preceding section, may deduct the amount thereof from dividends that are due or thereafter become due on such shares, and shall have a lien upon the shares of [fol. 69] stock and on all funds in its possession belonging to such shareholders, or which may at any time come into its possession, for reimbursement of the taxes so paid on account of the several shareholders, with legal interest; and such lien may be enforced in any appropriate manner."

Section 5673-1:

"Taxes assessed on deposits in a financial institution in this state shall be a lien on the deposit of each person as of the day fixed by the tax commission of Ohio for the listing of such deposits. Taxes assessed on the shares of stock of such an institution, all of whose shares are withdrawable and defined as deposits in chapter four of this title, shall be a lien on such shares so defined as deposits as of the day so fixed. It shall be the duty of every financial institution to pay the taxes on the amount of such deposits and/or withdrawable shares assessed in its name to the treasurer of state and any such institution failing to pay such taxes as herein provided shall be liable by way of penalty for the gross amount of the taxes due on and with respect to all its deposits and withdrawable shares assessed in its name and for an additional amount of one hun-

dred dollars for every day of delay in the payment of such taxes."

Section 5673-2:

"A financial institution so required to pay to the treasurer of state the taxes assessed upon its deposit accounts, as taxable property of its depositors, and or upon its withdrawable shares as taxable property of [fol. 70] its shareholders respectively, as provided in the next preceding section, may, upon receipt of notice of the day fixed for the listing of such deposits, charge the amount thereof to and deduct the same from the deposit of each depositor, or from the interest that is due or thereafter becomes due thereon, or from the dividends that are due or thereafter become due thereon, as the case may be, and shall have a lien upon such deposit, interest and/or dividends and on all funds in its possession belonging to such depositor or shareholder, or which may at any time come into its possession, for reimbursement of the taxes so payable, with legal interest. Such lien may be enforced in any appropriate manner at any time within six months after the payment of the taxes to the treasurer."

Appellant maintains that in assessing, under Section 5612 of the General Code, the "value of the property representing the capital employed" by an incorporated savings society, which has no capital stock, the state of Ohio must exclude from the assets of the institution the value of the United States obligations owned by it.

Appellant further says that Section 5612 General Code provides that the assessment of "property representing the capital employed" shall be measured by "the aggregate amount of the capital, the surplus or reserve fund and the undivided profits, as shown in the institution's annual tax report; and that the inclusion of the value of federal securities owned by such a financial institution in its tax base for assessing the capital employed by such institution in legal effect imposes a tax upon the securities in violation of Clause 2, Section 8, Article I of the United States Constitution and Federal Statute, Title 31, Section 742.

[fol. 71] Appellant further says that it is apparent upon the face of the tax returns filed by appellant for the years 1947 through 1951 that the value of United States obligations owned by appellant in each year exceeded by many millions of dollars the total of its surplus or reserve funds and undivided profits and that the exclusion of the value of the United States obligations from the asset values used in computing surplus or reserves and undivided profits would have left no surplus or reserves or undivided profits subject to tax.

Appellant also says that since it is a financial institution having no shares, it necessarily follows that it has no shareholders from whom it could seek reimbursement for any tax assessed on "the value of the property representing the capital employed", and thus the tax is assessed expressly and directly upon the appellant itself.

The Tax Commissioner says that appellant has voluntarily paid the taxes assessed against it on account of its surplus, reserves and undivided profits and that it can properly pass said taxes on to its depositors inasmuch as there is such an identity between the mutual fund and its depositors that when any such tax is paid the burden thereof is automatically passed on to the depositors.

With this contention of the Tax Commissioner we cannot agree—but even so the question as to whether the appellant may pass the tax on to its depositors is not in issue in this case—and in any event there is no statute which purports to give the appellant the right to pass this tax on to its depositors.

What we are interested in is the answer to this question:

What is the nature and kind of property which has been assessed for taxation by the Tax Commissioner?

[fol. 72] It appears to us to be clear that federal securities are the kind of property that has been assessed for taxation by the Tax Commissioner—for if federal securities are excluded from the Tax Commissioner's base the computation shows no tax due; and it likewise appears clear that the taxes have been assessed against the appellant corporation itself and not against any shareholders or depositors.

The distinction between taxing the shareholders upon their shares, and taxing the appellant upon its "capital or

property representing the capital employed" has been clearly drawn by our Supreme Court in the case of the Cleveland Trust Company v. Lander, 62 Ohio State Reports at page 266, affirmed in 184 U. S. 111. That case involved the tax upon the share as property of the shareholders, which was found constitutional, and the court said at page 274:

> "Here lies the distinction. The tax is upon the shares and not upon the capital. If the tax was on the capital, the federal bonds would have to be deducted, but being upon the shares no such deduction is required, allowed or authorized."

However, the decisions of the Supreme Court of the United States leaves no room for doubt but that a state tax upon the "capital employed, or the property representing it" (General Code, Section 5408), of a corporation is unconstitutional and violative of the requirement of the federal statute if and to the extent that the value of federal securities is included in the tax base. The cases sustaining the foregoing conclusion of law extend over a long period of years. People v. Commissioners of Taxes, 2 Black 620 (1863); Bank Tax Case, 2 Wall. 200 (1864); Home Savings Bank v. Des Moines, 205 U. S. 503 (1906); Farmers and Mechanics [fol. 73] Savings Bank v. Minnesota, 232 U. S. 516 (1914); Missouri v. Gehner, 281 U. S. 313 (1930); New Jersey Realty Title Insurance Company v. Division of Tax Appeals, 338 U. S. 665 (1950).

In a case where the issue was somewhat similar to that now before us this board, in Stephenson and Potter v. Glander, 67 N. E. 2d 14, 35 Ohio Opinions 368, 46 Ohio Law Abstract 203 (1946) said at page 370 of 35 Ohio Opinions:

> "In the consideration of the question thus presented it is recognized that the tax on dealers in intangibles provided for by Section 5414-1 et seq., General Code, is a property tax as distinguished from a franchise tax or other form of excise taxes; and that in his case where the tax is on the appellant as an unincorporated dealer in intangibles, the tax is on the employed capital of the appellant itself—unlike the case where the dealer in intangibles is a corporation and the ultimate inci-

dence of the tax is on the shares of stock as property of the shareholders. In this situation and recognizing that the greater bulk of the nontaxable securities here in question consists of United States government bonds, we are required to give application to the principle that the state has no power to assess against a corporation or other like entity a tax which is essentially a property tax, as distinguished from a franchise privilege or excise tax without allowing a deduction for sums invested in securities in the United States; and this is true whether the tax purports to be one laid directly upon the property or upon the capital of such entity. Home Insurance Company of New York v. New York, 134 U. S. 594, 10 S. Ct. 593, 33 L. Ed. 1025; Home Savings Bank v. Des Moines, 205 U. S. 503, 509, 521, 27 S. Ct. 571, 51 L. Ed. 901."

And again at page 373:

"Although there is, admittedly, some doubt as to the authority of the Board of Tax Appeals as a quasi ju- [fols. 74-158] dicial tribunal to pass on the constitutionality of statutes and to strike down statutes determined by it to be unconstitutional, this board, like courts and other tribunals possessing judicial or quasi judicial authority, is required to construe statutes so as to preserve, if possible, the provisions thereof as enacted."

With these thoughts in mind and upon the consideration of all the evidence before us we therefore find that the final order of the Tax Commissioner complained of was in error and said final order is hereby reversed.

We find that appellant, by virtue of the failure of the Tax Commissioner (in his computation of the "value of the property representing the capital employed") to exclude from its tax base the federal securities owned by appellant, has overpaid its intangible taxes for the years of 1947 through 1951 in the amounts stated in its application for a certificate of abatement; and this case is hereby remanded to the Tax Commissioner with instructions to issue to appellant the certificate of abatement as requested.

I hereby certify the foregoing to be a true and correct

copy of the action of the Board of Tax Appeals of the Department of Taxation this day taken with respect to the above matter.

Francis P. Howard, Secretary.

[fol. 159] IN THE SUPREME COURT OF OHIO

SOCIETY FOR SAVINGS IN THE CITY OF CLEVELAND, Appellee

v.

PECK, TAX COMMR., Appellant

Taxation—State property tax—Tax on federal securities not permitted—Capital or net worth of corporation—Federal securities excluded in computing—Ownership interests of owners of corporations taxable—Incorporated financial institution without capital stock—Capital derived from depositors—Depositors owners of ownership interests—Property tax levied on ownership interests—Amount of tax—Bank may be required to pay, when—Tax on "capital employed"—Section 5408, General Code—A tax on ownership interests of owners—"Value of prop-
[fol. 160] erty representing capital employed" defined—Section 5412, General Code—"Shares in and capital employed by" construed—Section 5638-1, General Code—Value of intangible interests of ownership of owners—Deduction on account of federal securities owned by corporation, not required.

1. A state cannot levy a property tax on federal securities.

2. A state cannot levy a property tax against a corporation on its capital or on its net worth without excluding federal securities from the assets of the corporation in the computation of such capital or net worth.

3. A state may levy a property tax on the ownership interests of the owners of a corporation, even though all the assets of the corporation are federal securities and even though the net worth of the corporation is used as the measure of the value for such taxation of such ownership interests.

4. A property tax may be levied on the ownership interests in a corporation even though the corporation is required to pay the tax on behalf of those who own such interests.

5. Where an incorporated bank has no capital divided into shares and no capital stock and all its capital is derived from its depositors, the depositors of such bank not only have interests in such bank as creditors of the bank for the amounts of their deposits but also are ordinarily the owners of all the ownership interests in such incorporated bank.

6. A property tax may be levied on the ownership and other interests of the owners of a corporation in such corporation at amounts equal to their book values, although, as long as the corporation continues to operate as a going concern, such interests may be withdrawn only at fixed amounts less than their book values and identical interests may be acquired from the corporation by others at such fixed amounts less than their book values.

7. Where all the ownership interests of the owners of a bank are vested in depositors of a single class, such bank may be required by statute to pay a property tax levied on such ownership interests if and when such bank has available for payment of interest to its depositors more than enough to pay the tax so levied.

8. With respect to an incorporated financial institution, the tax provided for by Section 5408, General Code, on "the capital employed, or the property representing it, in a financial institution the capital of which is not divided into shares, or which has no capital stock," is a tax on the owner-[fol. 161] ship interests of the owners of such corporation and not a tax on any property or capital of the corporation.

9. As to an incorporated financial institution, the words, "the value of the property representing the capital employed by such financial institution, not divided into shares" as found in the first sentence of Section 5412, General Code, describe the value of the intangible interests of ownership of the owners of such a corporation and do not refer to the value of any of the capital or property of or belonging to such corporation.

10. As to incorporated financial institutions, the words "shares in and capital employed by financial institutions" as found in Section 5638-1, General Code, describe the inter-

ests of ownership of the owners of such corporations and not any property of or belonging to such corporations.

11. In ascertaining and assessing pursuant to Section 5412, General Code, the value of the intangible interests of ownership of the owners of an incorporated financial institution having no capital divided into shares at the aggregate amount of the capital, the surplus or reserve fund and the undivided profits of the corporation as shown in the report required of the corporation, the Tax Commissioner is not required to make any deduction from such amount on account of federal securities owned by the corporation.

(No. 33523—Decided March 10, 1954)

Appeal from the Board of Tax Appeals.

The Society for Savings in the City of Cleveland filed with the Tax Commissioner an application pursuant to subdivision 2 of Section 1464-3, General Code, for a certificate of abatement for alleged overpayment of taxes assessed for the years 1947 to 1951, inclusive, pursuant to Sections 5408 and 5412, General Code, on "the capital employed, or the property representing it, in" said Society for Savings, and levied pursuant to Section 5638-1, General Code. The Society for Savings is an incorporated financial institution having depositors but its capital is not divided into shares and it has no capital stock. It is organized under Sections 710-145 to 710-149, inclusive, General Code.

Section 5408, General Code, provides:

[fol. 162] "All the shares of the stockholders in a financial institution, located in this state, incorporated or organized under the laws of the state or of the United States, the capital stock of which is divided into shares, excepting such as are defined as 'deposits' in Section 5324 of the General Code, and all the shares of the stockholders in an unincorporated financial institution located in this state, the capital stock of which is divided into shares held by the owners of such financial institution, and the capital employed, or the property representing it, in a financial institution the capital of which is not divided into shares, or which has no capital stock, located in this state, shall be listed and assessed at the book value thereof, and taxed in the manner provided in this Chapter."

Section 5409, General Code, provides:

"The real estate of a financial institution shall be taxed in the place where it is located, in like manner as the real estate of persons is taxed; but the tax provided for in this Chapter shall be in lieu of all other taxes on the other property and assets of such institution."

By Section 5411, General Code, a report is required "exhibiting in detail * * * the resources and liabilities of" a financial institution at the close of each year.

Section 5412, General Code, provides:

"Upon receiving such report the Tax Commissioner of Ohio shall ascertain and assess all the taxable shares of such financial institution, or the value of the property representing the capital employed by such financial institution, not divided into shares, at the aggregate amount of the capital, the surplus or reserve fund and the undivided profits as shown in such report, and the amount of taxable deposits of such institution in each county in which the institution maintained an office or offices for the receipt of deposits. Such amounts shall be assessed in the name of such financial insti- [fol. 163] tution excepting that the amounts of the taxable deposits wholly withdrawn from each such institution within the times mentioned in Section 5411-2 of the General Code and separately set forth in such report shall be subtracted from the amount of taxable deposits so assessed and separately assessed in the names of such respective depositors. In the case of an incorporated financial institution all of whose shares constitute deposits as defined in Section 5324 of the General Code such assessment of shares shall exclude the capital stock thereof as so shown but shall include the surplus or reserve and undivided profits so shown."

Section 5638-1, General Code, provides in part:

"Annual taxes are hereby levied on the kinds and classes of intangible property, hereinafter enumerated, on the intangible property tax list in the office of the Auditor of State and duplicate thereof in the office of Treasurer of State at the following rates, to wit:

"* * * deposits, two mills on the dollar; shares in and capital employed by financial institutions, two mills on the dollar * * *."

In computing, pursuant to Section 5412, General Code, "the aggregate amount of the capital, the surplus or reserve

fund and the undivided profits as shown in" the reports made by the Society for Savings for the years 1947 to 1951, inclusive, there was included in the assets of the Society for Savings the amount of federal securities owned by it. It was contended on behalf of the Society for Savings that such federal securities should have been excluded from its assets in making that computation.

The application was denied by the Tax Commissioner. On appeal to the Board of Tax Appeals the order of the Tax Commissioner was reversed and he was directed to issue the certificate of abatement as requested.

The Tax Commissioner has appealed to this court from that decision of the Board of Tax Appeals.

[fol. 164] *Messrs. Thompson, Hine & Flory, Mr. Jerome C. Fisher* and *Mr. Edgar P. Stocker*, for appellee.

Mr. C. William O'Neill, attorney general, and *Mr. Joseph S. Gill*, for appellant.

TAFT, J. The question to be decided is whether, in ascertaining and assessing "the value of the property representing the capital employed by [an incorporated] financial institution, not divided into shares," pursuant to Section 5412, General Code, the Tax Commissioner must eliminate federal securities owned by such institution in computing "the aggregate amount of the capital, the surplus or reserve funds and the undivided profits" of such institution.

It should be observed that the word "capital" when used with reference to a corporation, may be used to describe at least three different things. For example, it may be used (1) to describe all the property or assets of the corporation (see *National Bank* v. *Commonwealth*, 76 U. S. [9 Wall.], 353, 19 L. Ed., 701, 702), (2) to describe a bookkeeping figure representing a part or all of the net worth of the corporation (*Missouri, ex rel, Missouri Ins. Co.* v. *Gehner, Assessor*, 281 U. S., 313, 74 L. Ed., 870, 50 S. Ct., 326), and (3) to describe part or all of the property interest in the corporation which belongs to its shareholders or other owners.

The difference between the first and third of the above-mentioned uses of that word is well demonstrated in the opinion by Mr. Justice Miller in *National Bank* v. *Commonwealth, supra*, where it is said:

"* * * it has been established as the law governing this court that the *property or interest of a stockholder in an*

incorporated bank, commonly called a share, the *shares in their aggregate totality being called sometimes the capital stock* of the bank, *is a different* thing *from* the monied *capital of the bank* held and owned by the corporation. This capital may consist of cash, or of bills and notes discounted, [fol. 165] or of real estate combined with these. The whole of it may be invested in bonds of the government, or in bonds of the states, or in bonds and mortgages. In whatever it may be invested it is owned by the bank as a corporate entity, and not by the stockholders. A tax upon this capital is a tax upon the bank, and we have held that when that capital was invested in the securities of the government it could not be taxed, nor could the corporation be taxed as the owner of such securities.

"On the other hand, we have held that the shareholders, or stockholders, by which is meant the same thing, may be taxed by the states on stock or shares so held by them, although all the capital of the bank be invested in federal securities * * *." (Emphasis added.)

Considerable care must therefore be used in determining what the word "capital" means in each instance in which it is used in the statutes here involved.

Before analyzing the statutes involved it will also be helpful to state several basic propositions of law which seem to be well settled.

1. A state cannot levy a property tax on federal securities.

2. A state cannot levy a property tax against a corporation *on its* capital or *on its* net worth without excluding federal securities in the computation of *such* capital or net worth. In the absence of such an exclusion, such a tax is regarded in effect as being a tax on the federal securities. *Missouri, ex rel. Missouri Ins. Co.* v. *Gehner, Assessor, supra; Farmers and Mechanics Savings Bank of Minneapolis* v. *Minnesota*, 232 U. S. 516, 58 L. Ed., 706, 34 S. Ct., 354; and *New Jersey Realty Title Ins. Co.* v. *Division of Tax Appeals*, 338 U. S. 665, 94 L. Ed., 439, 70 S. Ct., 413.

3. On the other hand, a state may levy a property tax on the ownership interests of the shareholders of a corporation, even though all the assets of the corporation are [fol. 166] federal securities and even though the net worth of the corporation is used as the measure of the value for

such taxation of the ownership interests in the corporation. See for example *Cleveland Trust Co.* v. *Lander*, 184 U. S. 111, 46 L. Ed. 456, 22 S. Ct. 394, affirming 62 Ohio St. 266, 56 N. E. 1036; *Aberdeen Bank* v. *Chehalis County*, 166 U. S. 440, 41 L. Ed. 1069, 17 S. Ct. 629; *National Bank* v. *Commonwealth, supra;* and *Des Moines National Bank* v. *Fairweather, Mayor*, 263 U. S. 103, 68 L. Ed. 191, 44 S. Ct. 23.

As stated in the leading case of *Van Allen* v. *Assessors*, 70 U. S. (3 Wall.), 573, 583, 18 L. Ed. 229:

"* * * the tax on the shares is not a tax on the capital of the bank. The corporation is the legal owner of all the property of the bank, real and personal; and within the powers conferred upon it by the charter, and for the purposes for which it was created, can deal with the corporate property as absolutely as a private individual can deal with his own. This is familiar law, and will be found in every work that may be opened on the subject of corporations. A striking exemplification may be seen in the case of *Queen* v. *Arnoud* [9 Adolph & E. N. S. 806]. The question related to the registry of a ship owned by a corporation. Lord Denman oberved: 'It appears to me that the British corporation is, as such, the sole owner of the ship. The individual members of the corporation are no doubt interested in one sense in the property of the corporation, as they may derive individual benefits from its increase, or loss from its decrease; but in no legal sense are the individual members the owners.'

"The interest of the shareholder entitles him to participate in the net profits earned by the bank in the employment of its capital, during the existence of its charter, in proportion to the number of his shares; and, upon its dissolution or termination, to his proportion of the property that may [fol. 167] remain of the corporation after the payment of its debts. This is a distinct, independent interest or property, held by the shareholder like any other property that may belong to him. Now, it is this interest which the act of Congress has left subject to taxation by the states, under the limitations prescribed * * *."

Furthermore, merely because a statute requires a corporation primarily to pay a property tax on the ownership inter-

ests of its shareholders, such tax is not necessarily a tax on the property of the corporation. See for example *Cleveland Trust Co.* v. *Lander, supra; Aberdeen Bank* v. *Chehalis County, supra;* and *Des Moines National Bank* v. *Fairweather, Mayor, supra.*

As stated in the opinion in the leading case of *National Bank* v. *Commonwealth, supra:*

"But it is strongly urged that it is to be deemed a tax on the capital of the bank, because the law requires the officers of the bank to pay this tax on the shares of its stockholders. Whether the state has the right to do this we will presently consider, but the fact that it has attempted to do it does not prove that the tax is anything else than a tax on these shares. It has been the practice of many of the states for a long time to require of its corporations, thus to pay the tax levied on their shareholders. It is the common, if not the only, mode of doing this in all the New England states, and in several of them the portion of this tax which should properly go as the shareholder's contribution to local or municipal taxation is thus collected by the state of the bank and paid over to the local municipal authorities. In the case of shareholders not residing in the state, it is the only mode in which the state can reach their shares for taxation. We are, therefore, of the opinion that the law of Kentucky is a tax upon the shares of the stockholder."

As to the Society for Savings, the answer to the ques-[fol. 168] tion, whether the tax provided for by Section 5408, General Code, may be levied without excluding federal securities from the computation provided for in Section 5412, General Code, depends on whether the tax is or is not on the property *of* the corporation which is the owner of those federal securities, or on part or all *of its* net worth. This in turn depends upon the meaning of the words in Section 5408, General Code, "the capital employed, or the property representing it, in a financial institution the capital of which is not divided into shares, or which has no capital stock." Admittedly, the capital of the Society for Savings is not divided into shares and it has no capital stock.

In considering these statutory words, the question immediately arises as to whose "capital" or whose "property" is to be taxed. Is it the capital or property of the financial

institution or is it the capital or property of the owners of the financial institution?

On a hasty reading of these words, it might appear reasonably arguable that, standing alone, these words could be given either meaning.

However, if these statutory words are examined with reasonable care, it is difficult to comprehend how "capital employed, or the property representing it, in a financial institution" could properly be used to describe capital or property of and belonging to such institution. It is apparent from a reading of Section 5412, General Code, that these words could not have been intended to describe all the assets of the bank. That section provides for assessing "the value of the property representing the capital employed by such financial institution * * * at the aggregate amount of the capital, the surplus or reserve fund and the undivided profits." So far as the corporation is concerned, such an amount is a mere bookkeeping figure and is not represented by any property of the institution. See *Southern Gum Co.* v. *Laylin*, 66 Ohio St., 578, 596, 64 N. E., 564. [fol. 169] The property of the institution is an important factor in determining what it is but there is another equally important factor in its determination, that is, the debt obligations of the institution including its deposit obligations. On the other hand, the interests of the owners of the corporation are as to them a species of intangible property and are sometimes described as their capital investment in the corporation or the capital which the owners have "*in*" the corporation. As so used, such "capital employed * * * in" the corporation is always regarded as a species of intangible property belonging to such owners. As to them, their intangible property interest in the corporation may well be said to be "property representing" their "capital employed * * * in" the corporation.

Furthermore, the General Assembly clearly disclosed that it knew how to use the word "capital" to describe the capital of the corporation. Thus, after referring to "the capital employed * * * *in* a financial institution," it used the words "*the capital of* which is not divided into shares, or *which has no capital stock.*" If it had intended the words "the capital *employed* * * * *in* a financial institution" to

mean "the capital *of*" such institution, it could easily have said "the capital of a financial institution [which is] not divided into shares" instead of "the capital employed, or the property representing it, in a financial institution the capital of which is not divided into shares," thus eliminating the use of at least nine words and clearly expressing that intent. The General Assembly did not do that. By using the words "capital employed * * * in" instead of "capital of" a financial institution at the same time that it showed that it knew how to use the words "capital of" such an institution, the General Assembly clearly indicated an intention to distinguish between the capital of or belonging to such institution and the capital of and belonging to the owners and employed *in* the institution.

[fol. 170] In addition, when the whole of Section 5408, General Code, is read, it is apparent that it is the capital or property of the owners of the institution and not that of the institution which the General Assembly intended to describe by the use of the words "the capital employed, or the property representing it, in a financial institution the capital of which is not divided into shares, or which has no capital stock."

Section 5408, General Code, deals with three distinct objects of taxation:

(1) "Shares of * * * stockholders in a financial institution * * * incorporated * * * the capital stock of which is divided into shares."

(2) "Shares of * * * stockholders in an unincorporated financial institution * * * the capital stock of which is divided into shares held by the owners of such financial institution."

(3) "The capital employed, or the property representing it, in a financial institution the capital of which is not divided into shares, or which has no capital stock."

As to the first two objects of taxation, it is clear that the property intended to be taxed is that of the owners of the financial institution, that is, its shareholders, and not the property of the financial institution. It would not be reasonable to impute to the General Assembly an intent, with respect to the third object of taxation there dealt

with, to provide for taxing the property of the financial institution, instead of the property of the owners of the financial institution, unless the language used clearly required the imputation to the General Assembly of such an inconsistent intent.

With respect to statutory provisions somewhat similar to Section 5409, General Code, it is said in the opinion in *Des Moines National Bank* v. *Fairweather, Mayor, supra,* at pages 110 and 111:

"As construed by the Supreme Court of the state, the statute as a whole contemplates * * * that the shares be [fol. 171] assessed to the stockholders as their property; and as illustrating that the statute makes a clear distinction between the shares and the property of the bank, the court points to the provision which requires that the real estate be assessed against the bank and to the succeeding provision which declares that 'the property of such corporation shall not be otherwise assessed.' This, without more, seems completely to refute the contention that what the statute really directs is an assessment of the bank's property instead of the stockholders' shares."

Likewise Section 5412, General Code, makes it apparent that the General Assembly intended to tax the property of the owners of financial institutions with respect to all three of the above-mentioned objects of taxation dealt with in Section 5408, General Code. Thus the first sentence of that section provides for a uniform manner of ascertaining and assessing the amount at which the property is to be taxed with respect to all three of those objects of taxation.

Also, that sentence obviously regards "shares of stockholders in a financial institution [as appears from Section 5408, General Code, these are the 'shares' meant]" which has shares as having a taxable equivalent in a financial institution which has no shares. It describes that taxable equivalent as "the value of the property representing the capital *employed by* [not 'of'] such financial institution, not divided into shares." "Shares of stockholders in a financial institution" obviously are evidence of and represent "capital employed by" a financial institution where it has shares. See Section 5408, General Code.

The legislative intent, that the words "capital employed in" or "by" a financial institution not having shares should describe the intangible property interest of the owners of such an institution just as the words "shares in" do, is [fol. 172] further demonstrated by the words of Section 5638-1, General Code, levying the tax on "the kinds and classes of intangible property * * * enumerated" including "shares in and capital employed by financial institutions."

Such conclusion is further fortified by the last sentence of Section 5412, General Code, which deals with financial institutions having only withdrawable shares. By the provisions of Section 5324, General Code, such shares are defined as "deposits"; and, in describing the first of the three above-mentioned objects of taxation dealt with in Section 5408, General Code, the shares of such institutions are expressly excepted from the shares of the classification of financial institutions there involved. Under Section 5406, General Code, those withdrawable shares must be returned as deposits. Under the first sentence of Section 5412, General Code, their amounts are assessed for taxation as deposits but not as "shares." However, the last sentence of Section 5412, General Code, provides for their assessment also as shares and states with respect to them that "such assessment of shares shall exclude the capital stock thereof * * * [already assessed as deposits] but shall include the surplus or reserve and undivided profits * * *." *First Federal Savings & Loan Assn. of Warren* v. *Evatt, Tax Commr.*, 143 Ohio St., 243, 54 N. E. (2d), 795.

Our conclusion is that the words, "capital employed, or the property representing it, in a financial institution the capital of which is not divided into shares or which has no capital stock" as found in Section 5408, General Code, the words "the value of the property representing the capital employed by such financial institution, not divided into shares" as found in Section 5612, General Code, and the words "capital employed by financial institutions" as found in Section 5638-1, General Code, were intended by the Gen- [fol. 173] eral Assembly in each of those sections to describe the intangible property interests of ownership in a financial institution and not to describe the capital or any of the

property of or belonging to such an institution. It follows that, where a financial institution without capital divided into shares or without capital stock is a corporation, the General Assembly indicated an intent to impose a tax upon the intangible property interests of ownership of the owners of the corporation, and not a tax upon the capital of or any property of or belonging to the corporation. The Society for Savings is such an incorporated financial institution.

However, it is argued that such a legislative intention cannot be given effect because there is no statutory provision which would enable the Society for Savings to secure reimbursement from those whose property would be taxed for the tax thereon that the Society for Savings would be required to pay.

In Sections 5672 and 5673, General Code, provisions are made to insure reimbursement from its shareholders by a financial institution on account of taxes paid by it which were assessed on its nonwithdrawable shares. Likewise provisions to insure reimbursement on account of payment by a financial institution of taxes assessed upon its deposits as taxable property of its depositors and its withdrawable shares as taxable property of its shareholders are made in Sections 5673-1 and 5673-2, General Code. However, it is arguable that, unless these latter two sections are given a broader construction than their words appear to justify, there is no specific statutory provision which would enable an incorporated financial institution, the capital stock of which is not divided into shares or which has no capital stock, to secure reimbursement from those who are or may be owners of the intangible property representing the capital employed by such owners *in* the corporation. In our [fol. 174] opinion, such a provision is not necessary to enable such a financial institution to secure such reimbursement. *Citizens National Bank* v. *Commonwealth of Kentucky*, 217 U. S., 443, 54 L. Ed., 832, 30 S. Ct., 532; *Aberdeen Bank* v. *Chehalis County, supra; and National Bank* v. *Commonwealth, supra.*

With respect to that species of intangible property which represents the ownership interests in a corporation, the capital of which is not divided into shares or which has no

capital stock, payment by the financial institution of the tax will always in effect amount to payment by those who are the beneficial owners of such intangible property. Such payment will necessarily reduce the amount, which the corporation will have available for payment of interest to depositors or holders of withdrawable shares and which will be available for protection of their deposits or stock claims and for distribution to them in the event of liquidation of the corporation. Thus, the financial institution, which pays the tax on their property interests in the corporation, will always be able to reimburse itself by reducing the ultimate value of the property interests of those who are the only ones who can have any claim to benefit from the ownership interests taxed.

Payment by the corporation of the tax on their intangible ownership interests in the corporation will necessarily reduce, to the extent of the payment made, those funds available for payment of interest on their deposits, and will likewise reduce the amount available only to them in the event of liquidation of the corporation. In the instant case, it appears that there was available for payment of interest on deposits more than enough to pay the taxes assessed against the owners of the "capital employed in" and "by" the Society for Savings as measured by the provisions of Section 5612, General Code, for assessment of that "cap-[fol. 175] ital." That capital, as well as their deposit claims, was owned by the depositors.

The decision actually rendered by this court in *Collett, Treas.*, v. *Springfield Savings Society*, 56 Ohio St., 776, 49 N. E., 1109 (affirming without opinion 13 C. C., 131, 7 C. D., 146), is not inconsistent with such a conclusion.

In the opinion of *Bank Commissioners* v. *Watertown Savings Bank*, 81 Conn., 261, 70 A., 1038, it is said:

"It is true that the profits or income of savings-banks are not all payable at the same time or in the same way, and that they may be held by the bank as a fund until they have reached a specified amount. This is for the sole purpose of protecting depositors against unforeseen contingencies. There is nothing in these statutes which militates against the general proposition that the income or

profits of savings-banks belong to the depositors and are a part of the deposits. In the end, it is the general spirit and purpose of the charters of savings-banks and of the laws of this state, that depositors, or their representatives, are entitled to all the pecuniary benefits arising from the deposits, less the reasonable expenses that may be chargeable thereon."

In *Barrett* v. *Bloomfield Savings Institution*, 64 N. J. E. 425, 54 A., 543 ("affirmed, for the reasons stated," 66 N. J. Eq. 431, 57 A., 1131), it is said on page 434 in the opinion in quoting with approval from the opinion in *Hannon* v. *Williams*, 7 Stew Eq., 255:

"'In a savings bank the depositors bear, in great degree, the same relation to each other and to the property of the bank as do the stockholders in other monetary institutions. To the corporation itself they occupy the double relation of stockholders and creditors. In prosperity they are the stockholders among whom the profits are divided. In case of insolvency they are the creditors, and usually the only [fol. 176] creditors, among whom the remaining assets are to be distributed.'"

In *Huntington* v. *Savings Bank*, 96 U. S., 388, 24 L. Ed. 777, it is said in the opinion by Mr. Justice Strong:

"* * * the primary idea of a savings bank has been, that it is an institution in the hands of disinterested persons, the profits of which, after deducting the necessary expenses of conducting the business, inure wholly to the benefit of the depositors, in dividends, or in a reserved surplus for their greater security."

In *Lewis, Admr.*, v. *Lynn Institution for Savings*, 148 Mass., 235, 19 N. E., 365, 12 Am. St. Rep., 535, 1 L. R. A., 785, it is said on page 243 in the opinion by Allen, J.:

"* * * the fundamental idea has never been departed from, that all the funds and investments of a savings bank are held exclusively for the benefit and security of the depositors. This idea was, and still is, the corner stone of the whole system. There is no corporation, with any purpose or possibility of profit to itself, independently of the depos-

itors; but the latter are to share whatever profit may be made in just proportion among themselves. * * *"

In *Cogswell* v. *Rockingham Ten Cents Savings Bank*, 59 N. H. 43, it is said in the opinion by Clark, J.:

"The assets of savings-banks consist of loans of money made by them for the benefit of their depositors, from whom the money was derived, and correspond to the capital stock in banks of discount, and depositors in savings-banks stand in the same relation to the assets of the bank as stockholders to banks of discount."

See also *Worcester County Inst. for Savings* v. *City of Worcester*, 10 Cushing (Mass.), 128, and *Providence Inst. for Savings* v. *Gardner*, 4 R. I., 484, indicating that the depositors of an incorporated financial institution having no capital stock, in addition to being creditors of the corpora- [fol. 177] tion, have ownership interests in such corporation corresponding to the ownership interests of the shareholders in an incorporated financial institution having shares of capital stock.

Thus, the ownership interests of the depositors in the corporation and not any capital or property of or belonging to the corporation are the property which is to be taxed pursuant to Section 5408, General Code, assessed pursuant to Section 5412, General Code, and upon which the two-mill tax is levied under Section 5638-1, General Code; and it appears that the corporation, although required to pay the tax, will, in doing so, be imposing the full burden of that tax on those whose property interests are taxed.

It is further argued, in effect, that the value of the interests of a depositor in the Society for Savings can never rise above the amount of his deposit unless the corporation goes into liquidation, that anyone by making a deposit can secure interests equal to that of an existing depositor having a deposit of the same amount, and that therefore a depositor's interests cannot be subjected to taxation at an amount in excess of the amount of his deposit.

This argument might be persuasive if it were true that the property interest of a shareholder of a corporation could not be taxed at an amount equal to the book value of his shares in the corporation where such book value ex-

ceeded the actual value of the shares. We do not believe that any such contention could or even would be made. The book value of shares of stock may be more or less than the value of such shares. It may be much more. *Opdyke* v. *Security Savings & Loan Co.*, 157 Ohio St., 121, 148, 105 N. E. (2d), 9.

On the other hand, as to a depositor in a corporation such as the Society for Savings, it is not likely that the total of the amount of his deposit plus the amount of the book [fol. 178] value of his ownership interest as a depositor (this total being the book value of all his interests in the corporation) will ever be much more than what he can withdraw in cash at any time. When taxed on that total, *i.e.*, the book value of all his interests in the corporation rather than only on the lesser withdrawable amount of his deposit, a depositor of such corporation is not exposed to as great a taxation hazard as is a shareholder of a bank, who may be taxed on the book value of his shares even though such shares have no withdrawable value and have a realizable market or even actual value very much below their book value.

Unlike in *Home Savings Bank* v. *Des Moines*, 205 U. S., 503, 51 L. Ed., 901, 27 S. Ct., 571, our statutes do not justify our reaching a conclusion in the instant case similar to that reached by the Iowa Supreme Court in that case, that the taxes are levied on the corporation. As hereinbefore pointed out, the property to be taxed under our statutes is "the capital employed * * * in" or "by" a financial institution, that is, the intangible property interests of ownership of the owners of the institution representing that capital, not the capital *of* the financial institution. The "taxes" here involved are "*levied* on * * * kinds and classes of intangible property * * * enumerated," including "shares in and capital employed by [not capital of] financial institutions"; and, as hereinbefore pointed out, the General Assembly clearly indicated an intention that it is the capital of the owners of the institutions and not of the institutions that is to be taxed. See Sections 5408 and 5412, General Code.

As we view it, the *Des Moines case* holds merely that the fact, that a bank may in effect reimburse itself from its shareholders on account of a tax levied against it on its net

worth, will not justify the conclusion that, in computing such net worth, it is unnecessary to exclude federal securities. Here, unlike in that case, the taxes are not levied [fol. 179] against the corporation on the capital or net worth of the corporation but are levied against the ownership interests of the owners of the corporation, whether or not such ownership interests are evidenced by shares or capital stock.

As stated on page 518 in the opinion in that case:

"The tax assessed to shareholders may be required by law to be paid in the first instance by the corporations themselves, as the debt and in behalf of the shareholder, leaving to the corporation the right to reimbursement for the tax paid from their shareholders, either under some express statutory authority for their recovery or under the general principle of law that one who pays the debt of another at his request can recover the amount from him. *National Bank* v. *Commonwealth*, 9 Wall., 353; *Lionberger* v. *Rouse*, 9 Wall., 468; *Aberdeen Bank* v. *Chehalis County*, 166 U. S., 440; *Merchants Bank* v. *Pennsylvania*, 167 U. S., 461; *Cleveland Trust Co.* v. *Lander*, 184 U. S., 111. The theory sustaining these cases is that the tax was not upon the corporations' holdings of bonds, but on the shareholders' holding of stock, and an examination of them shows that in every case the tax was assessed upon the property of the shareholders and not upon the property of the corporation. There is nothing in them which justifies the tax under consideration here, *levied*, as has been shown, on the corporate property."

It may be observed that the *Des Moines case* involved "a tax * * * levied under a law * * * which provided that 'shares of stock of state * * * banks * * * shall be assessed to such banks * * * and not to the individual stockholders.'" At the same time, the statutes of that state expressly provided that shares of stock of national banks should be assessed to the individual stockholders.

That *Farmers & Mechanics Savings Bank of Minneapolis* v. *Minnesota*, *supra*, is not applicable appears from the following in the court's opinion:

[fol. 180] "The Supreme Court of Minnesota held that this section imposed * * * a property tax, and that the surplus *of*

savings banks as thus determined is taxable property. This construction is not questioned here; perhaps is not open to question." (Emphasis added.)

Likewise, the cases of *Missouri, ex rel. Missouri Ins. Co.*, v. *Gehner, Assessor, supra*, and *New Jersey Realty Title Ins. Co.* v. *Division of Tax Appeals, supra*, each involved the levy of a tax against a corporation on part or all of the net worth of the corporation. As hereinbefore pointed out, the taxes in the instant case are not levied on any part of the net worth of the financial institutions but are levied on the interests of the owners of such institutions in the capital of such institutions, whether evidenced by shares of stock or not so evidenced.

The decision of the Board of Tax Appeals is reversed and the order of the Tax Commissioner is affirmed.

Decision reversed.

WEYGANDT, C. J., MIDDLETON, ZIMMERMAN and LAMNECK, JJ., concur.

STEWART, J., dissenting. I am unable to agree with the conclusion of the majority of the court with reference to the taxation of the capital employed, or the property representing it, in a financial institution, the capital of which is not divided into shares, or which has no capital stock.

Ever since Chief Justice Marshall's historic opinion in *M'Culloch* v. *Maryland*, 17 U. S., 316, 4 L. Ed., 579, both by judicial decision and legislative fiat a state can not levy a property tax on federal securities, no matter who may be the owner of them.

Section 5408, General Code, as stated in the majority opinion, deals with three distinct objects of taxation: (1) [fol. 181] "Shares of * * * stockholders in a financial institution * * * incorporated * * * the capital stock of which is divided into shares."

(2) "Shares of * * * stockholders in an unincorporated financial institution * * * the capital stock of which is divided into shares held by the owners of such financial institution."

(3) "The capital employed, or the property representing

it, in a financial institution the capital of which is not divided into shares, or which has no capital stock."

I entirely agree with the majority that the shares of a financial corporation may be taxed and that the value of the shares may be ascertained by adding the amount of the capital, the surplus or reserve fund, and the undivided profits, without any deduction of federal securities in those items. This is so because it has long been held that the shares of a financial institution are a property apart from the assets of the institution, and in Ohio the tax on such shares, although levied in the name of the institution, is really a tax on the owners of the shares, and Sections 5672 and 5673, General Code, provide for reimbursement to the financial institution from the shareholders for the payment of the tax assessed on the shares.

I likewise agree that a tax may be levied on the deposits in a financial institution for again, that tax is on credits which are owned by the depositors.

Where one has a deposit in a financial institution, the relation of debtor and creditor arises, and a deposit, therefore, is not an asset of the institution but is, indeed, a liability because the institution owes the amount of it to the depositor.

In Ohio the tax on a deposit is on property separate and apart from any assets of the bank and, although assessed in the name of the bank, it is really against the depositor, and in Sections 5673-1 and 5673-2, General Code, provision is made for reimbursement to the bank from the depositor [fol. 182] for the tax paid on the deposit.

However, in reference to the provision for taxing the capital employed, or the property representing it, in a financial institution, the capital of which is not divided into shares, or which has no capital stock, I am of the opinion that such a tax can not be assessed without first deducting federal securities which are a part of the property to be taxed. Such a tax, as stated in Section 5412, General Code, is on the aggregate amount of the capital, surplus, reserve fund, and the undivided profits. The tax is assessed against the financial institution itself and there is no provision for such institution to recover from any one the tax paid as

there is specifically made in reference to a tax on shares or deposits.

It is argued that the tax assessed against such an institution without shares is, in actuality, assessed against the owners of the capital, surplus, reserve fund, and undivided profits, and that such owners are the depositors in the institution.

Admitting that there is no way for the institution to obtain reimbursement from such depositors for the tax paid on the assets, yet it is said that the depositors really pay it because the tax creates a decrease in the assets of the institution in which they have intangible rights. It would not be contended that a tax could be assessed against the capital, surplus, reserve fund, and undivided profits of a bank with shares, without deducting any federal securities from the property assessed, and yet the same argument could be made to the effect that such a tax was against the shareholders because it would decrease the amount of assets in the bank, which they, as shareholders, own.

What depositors own the capital, surplus, reserve fund, and undivided profits of a financial institution without shares?

[fol. 183] The majority opinion asserts that present depositors own it.

Why should one who becomes a depositor today own a share of the surplus and undivided profits of a savings institution, which have been built up by present long-time depositors and by great numbers of past depositors who have drawn out their deposits (and that is all they can get), but whose deposits have built up the surplus assets of the institution?

It seems to me that when it is said that the depositors own the capital, surplus, reserve fund, and undivided profits of a financial institution, it is going to be an impossible task to ascertain what depositors own such assets and in what proportions.

Where a deposit is made in a bank, the bank is a debtor of the depositor, and, assuredly, at least during the corporate existence of the bank, the depositor can receive nothing in excess of the actual deposit he made.

Assuming that the depositors do own the capital employed, or the property representing it, in a financial insti-

tution without shares, it seems to me that it would still be unlawful to assess a tax against such property without deducting any federal securities therefrom. A state cannot levy a property tax on federal securities, regardless of who owns them.

It is conceded in the majority opinion that the tax against the capital employed or the property representing it can not be assessed if such capital and property belong to the financial institution itself. In my opinion, the same inhibition against assessing the tax exists, where such capital employed or the property representing it is owned by any person or group of persons whether known or unascertainable. The ownership of the property is not essential. The vice in the tax assessment is in taxing property which includes federal securities, without the deduction of such securities.

[fol. 184] In the case of *Farmers & Mechanics Savings Bank of Minneapolis* v. *State of Minnesota*, 232 U. S., 516, 58 L. Ed., 706, 34 S. Ct., 354, it was held, in paragraph three of the L. Ed. headnotes:

"A state, in taxing as credits the surplus of a savings bank, ascertained by deducting from its assets the amount of its deposits and other accounts payable, must leave out of the computation of its assets bonds issued by territorial municipalities which are exempt from taxation as the obligations of an agency of the federal government."

That case concerned a savings bank having no capital stock and taxable under a Minnesota law which provided for ascertaining the surplus remaining after deducting from its assets (other than real estate which was separately assessed) the amount of the deposits and all other accounts payable, the surplus being taxed as "credits."

The Supreme Court of Minnesota had held that the state law imposed not a franchise but a property tax and that the surplus of the savings bank as thus determined was taxable property.

In the opinion Justice Pitney said:

"It is, however, further suggested that the judgment under review does not sustain a tax upon the bonds as property, but only a tax upon the surplus of the savings

bank, computed by taking into the account all of its assets, amounting to about $12,000,000, of which the bonds were only about $700,000, and deducting therefrom its liabilities. But as the surplus is treated as property and taxed as such, it is obvious that some portion of the burden of the tax is attributable to the ownership of the municipal bonds. In *Bank of Commerce* v. *New York City*, 2 Black, 620, it was held that the state of New York in taxing the capital of banks according to its valuation must leave out of the calculation that portion of the capital ivested in the stocks, bonds, or other securities of the United States not liable to [fol. 185] taxation by the state. And see *Bank Tax Case*, 2 Wall, 200; *Home Savings Bank* v. *Des Moines*, 205 U. S., 503, 509.

"It results that the inclusion of the bonds now in question in the list of the assets of plaintiff in error, in ascertaining its surplus for the purpose of imposing a state property tax thereon, was repugnant to the Constitution of the United States."

There is no claim anywhere in the majority opinion here that the imposition of the tax concerned anything but a property tax, so it seems to me that the decision of the *Farmers & Mechanics Savings Bank case, supra*, is dispositive of the question before us.

In *People ex rel. Bank of Commerce*, v. *Commrs. of Texas*, 67 U. S., 620, 17 L. Ed., 451, it was held, in the L. Ed. headnotes:

"The stock of the United States, constituting a part or the whole of the capital stock of a bank organized under the banking laws of New York, is not subject to state taxation.

"It makes no difference that the tax is on the aggregate of the tax payer's property, and the stock is not taxed by name."

If the capital stock of a bank with shares can not be taxed without deducting any federal securities, how is it legally possible to so tax such capital stock of a savings bank without shares?

It can be much more cogently argued that the tax assessed against the capital of the bank with shares would be borne more acutely by the shareholders than would the tax as-

sessed against the capital of the bank without shares be borne by its depositors.

It seems to me that taxing the capital employed, or the property representing it, and ascertaining its value at the aggregate amount of the capital, the surplus or reserve fund, and the undivided profits, without deducting therefrom any federal securities contained therein, is repugnant to the [fols. 186-189] Constitution of the United States, regardless of who the owner of that property may be, and that a judgment upholding such procedure is in direct conflict with the declaration of the Supreme Court of the United States in the *Farmers & Mechanics Savings Bank case, supra.*

It must be remembered that the present case involves the imposition of a tax and not a claim for exemption from one. In such a situation, the law must be strictly construed against the taxing authority,

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[fol. 190] IN THE SUPREME COURT OF OHIO

JUDGMENT—March 10, 1954

This cause came on to be heard upon the transcript of the Record of the Board of Tax Appeals and was argued by counsel. On consideration whereof, it is ordered and adjudged by this Court, that the decision of the said Board of Tax Appeals be and the same hereby is reversed for the reasons stated in the opinion rendered herein.

It is further ordered and adjudged that the order of the Tax Commissioner be, and the same hereby is, affirmed.

It is further ordered and adjudged that appellant recover from appellee his costs herein taxed at $,
for which execution is hereby awarded.

Ordered, That a special mandate be sent to the Board of Tax Appeals, to carry this Judgment into Execution.

IN THE SUPREME COURT OF OHIO

ORDER DENYING REHEARING—March 31, 1954

Upon consideration of the above application for rehearing, it is ordered by the Court that rehearing be, and it hereby is, denied.

[fol. 191] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 192] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1954

No. 204

SOCIETY FOR SAVINGS IN THE CITY OF CLEVELAND, Appellant,

vs.

JOHN W. PECK, TAX COMMISSIONER

Appeal from the Supreme Court of the State of Ohio.

ORDER NOTING PROBABLE JURISDICTION—October 14, 1954

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is transferred to the summary calendar. The Solicitor General is invited to file a brief as *amicus curiae*.

Mr. Justice Burton took no part in the consideration or decision of this question.

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SUPREME COURT, U.S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1954

No. 220

FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF WARREN, APPELLANT,

vs.

STANLEY W. BOWERS (SUCCESSOR TO JOHN W. PECK), TAX COMMISSIONER OF OHIO

APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

FILED JULY 16, 1954
PROBABLE JURISDICTION NOTED OCTOBER 14, 1954

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 220

FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF WARREN, APPELLANT,

vs.

STANLEY W. BOWERS (SUCCESSOR TO JOHN W. PECK), TAX COMMISSIONER OF OHIO

APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

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[fol. 1] [File endorsement omitted]

IN THE SUPREME COURT OF OHIO

No. 33525

First Federal Savings and Loan Association of Warren, Appellee

v.

Stanley E. Bowers (Successor to John Peck), Tax Commissioner of Ohio, Appellant

Petition for Appeal—Filed June 23, 1954

Now comes First Federal Savings and Loan Association of Warren and, for its petition for appeal to the Supreme Court of the United States, respectfully shows that:

On the 31st Day of March, 1954, final judgment was rendered in the above entitled cause by the Supreme Court of the State of Ohio, the highest Court in such state, against this appellant (appellee therein) and in favor of John W. Peck, Tax Commissioner of Ohio, (appellant therein) denying appellant's application for rehearing after reversing a decision of the Board of Tax Appeals of the State of Ohio, insofar as such decision had reversed an order of the Tax Commissioner of Ohio and remanded the cause to the Tax Commissioner with instructions to issue to this appellant for the years 1947-1951 a certificate of abatement for the [fol. 2] overpayment of intangible personal property taxes assessed against and paid by this appellant as a financial institution upon the basis of the property representing the capital employed by it at the aggregate amount of its reserves and undivided profits for such years and each of them.

In this suit, there was drawn in question the validity of statutes of the State of Ohio providing for and relating to the taxation of intangible personal property of financial institutions, particularly General Code §§ 5324, 5328-1, 5406, 5407, 5408, 5409, 5410, 5411, 5411-1, 5411-2, 5412, 5412 1, 5638-1, 5673-1 and 5673-2.

By its decision and judgment the Supreme Court of Ohio denied the exemption from personal property taxation by

the State of Ohio of United States bonds and interest thereon and shares in the Federal Home Loan Bank (a federal government instrumentality) owned by appellant and held that appellant was not entitled to deduction of the amount thereof from the basis of such taxes, in violation of the laws of the United States, U. S. Code Title 31, Section 742 and Title 12, Section 1433; and thereby invaded the fiscal powers of the federal government contrary to Article I, Section 8, deprived appellant of property without due process of law, denied it the equal protection of the laws and unreasonably discriminated against appellant by double taxation of its deposits contrary to Section 1 of the Fourteenth Amendment to the Constitution of the United States.

The laws of Ohio so construed and held valid and applicable to appellant are repugnant to the laws and Constitution of the United States.

[fol. 3] Appellant presents herewith an Assignment of Errors and a Statement in Support of Jurisdiction on Appeal.

Wherefore, appellant prays the allowance of an appeal from the judgment of the Supreme Court of the State of Ohio to the Supreme Court of the United States; that the amount of security be fixed; that the material parts of the record, proceedings and papers upon which said final judgment and decree was based be duly authenticated and sent to the Supreme Court of the United States; that provision be made for the safe-keeping, transporting and return of the original transcript before the Tax Commissioner and the Board of Tax Appeals, the original exhibits introduced in evidence in the Board of Tax Appeals, the entry of the Board of Tax Appeals in the companion case of Society for Savings in the City of Cleveland, No. 22464 incorporated by reference in its entry in this case and all briefs.

Robert G. Day, Attorney for Appellant.

Hoppe, Day & Ford, 702 Second National Building, Warren, Ohio. Of Counsel.

[fol. 4] [File endorsement omitted]

IN THE SUPREME COURT OF OHIO

[Title omitted]

ASSIGNMENT OF ERRORS AND PRAYER FOR REVERSAL—Filed June 23, 1954

First Federal Savings and Loan Association of Warren, appellant herein, assigns the following errors in the record and proceedings in the Supreme Court of Ohio in the above entitled case.

1. The statutes of Ohio providing for and relating to the intangible personal property taxation of appellant as a financial institution upon its deposits, reserves and undivided profits as construed and enforced by the judgment of the Supreme Court of Ohio are repugnant to

(a) The Constitution of the United States Article 1, Section 8 and the Fourteenth Amendment, Section 1;

(b) The laws of the United States, to-wit: U. S. C. Title 31, Section 742 and Title 12, Section 1433.

[fol. 5] The laws of Ohio so construed in effect impose a tax upon, and deny exemption of, the United States bonds with interest thereon and Federal Home Loan Bank shares owned by appellant, invade the fiscal powers of the Federal government, deprive the appellant of property without due process of law, illegally discriminate against it and impose double taxation on the deposits of the appellant.

2. The Court erred in holding valid and not repugnant to the laws and the Constitution of the United States, the Statutes of Ohio providing for the taxation of appellant's property representing capital employed by it without deduction of the value of U. S. bonds and stock in the Federal Home Loan Bank (a federal government instrumentality) owned by appellant from the tax base.

3. The State of Ohio by the statutes involved herein and by the decisions, judgment and order of the Court

and Tax Commissioner invaded the fiscal powers of the federal government, deprived the appellant of property without due process of law, illegally discriminated against it and imposed double taxation on the deposits of the appellant, in violation of the laws and Constitution of the United States.

4. The Court erred in holding that the tax based [fol. 6] upon surplus or reserves and undivided profits is a tax upon the depositors whereas it was assessed against and paid by appellant without provision for reimbursement of appellant and is in legal effect a tax upon appellant.

5. The Court erred in reversing and not affirming the order of the Board of Tax Appeals insofar as the latter directed the issuance of a certificate of abatement of personal property taxes assessed against and paid by appellant for the years 1947-1951.

6. The judgment is contrary to law and to the evidence.

Wherefore, appellant prays that the final judgment of the Supreme Court of Ohio be reversed and for such other relief as may be fit and proper.

Robert G. Day, Attorney for Appellant

[fol. 7] [File endorsement omitted]

IN THE SUPREME COURT OF OHIO

[Title omitted]

ORDER ALLOWING APPEAL—Filed June 23, 1954

This day this cause came on to be heard upon the petition of First Federal Savings and Loan Association of Warren for appeal to the Supreme Court of the United States from the final judgment entered in the above entitled cause by the Supreme Court of the State of Ohio on March 31, 1954, and upon the assignments of error, prayer for reversal, and jurisdictional statement filed therewith; and upon consideration thereof it is ordered that an appeal

be and it is hereby allowed to the Supreme Court of the United States from the Supreme Court of Ohio as prayed for in said petition; that the Clerk of the Supreme Court of Ohio shall prepare and certify a transcript of the record and proceedings in the above entitled cause and transmit the same to the Supreme Court of the United States within forty (40) days from the date hereof.

[fols. 8-16] And, it appearing that the original papers including the transcript of the Tax Commissioner of Ohio and the exhibits may be necessary for inspection by the Supreme Court of the United States, it is ordered that the Clerk of this Court include in or transmit with the transcript of the record to the Supreme Court of the United States the original papers including *inter al.* the original transcript of proceedings and exhibits before the Tax Commissioner and the Board of Tax Appeals, of the Tax Department, for receipt and consideration along with the transcript and for return to the Clerk of this Court after determination of the appeal.

Further ordered that the amount of the appeal bond required of appellant be and it is hereby fixed in the sum of $250 with good and sufficient surety and that such bond be conditioned as required by law; and the appellant having presented herewith its bond for appeal in the sum of $250 conditioned as required by law the same is hereby approved and accepted.

Further ordered that citation shall issue in accordance with law.

Carl V. Weygandt, Chief Justice.

[fol. 17] BEFORE THE BOARD OF TAX APPEALS, DEPARTMENT OF TAXATION, STATE OF OHIO

No. 22533

FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF WARREN
Appellant,

vs.

JOHN W. PECK, Tax Commissioner of Ohio, Appellee
ENTRY—March 2, 1953

Appearances:

For the appellant, Robert G. Day, for the appellee, C. William O'Neill, Attorney General of Ohio by Joseph S. Gill, First Assistant.

For appellant *Amicus Curiae*, Charles A. Eberly.

This cause and matter came on to be considered by the Board of Tax Appeals upon an appeal filed herein under date of August 27, 1952, by the appellant above named from a final order of the Tax Commissioner dated July 30, 1952 in and by which final order the Tax Commissioner denied appellant's application for a certificate of abatement for the alleged overpayment of intangible taxes for the years 1947 through 1951.

The cause was submitted on the notice of appeal, the Tax Commissioner's Transcript for the years in question, a stipulation of facts signed by counsel, the evidence presented to this Board at a hearing upon the appeal, and briefs of counsel.

The notice of appeal, as filed with the Board of Tax Appeals, reads as follows:

> "Now comes the Appellant, First Federal Savings and Loan Association of Warren, whose principal office and place of business is at 175 East Market Street, Warren, Ohio and gives notice of appeal to the Board of Tax Appeals of Ohio from a finding and order of the Appellee John W. Peck, Tax Commissioner of Ohio, dated July 30, 1952, and mailed July 31, 1952, [fol. 18] denying Appellant's application and claim for

refund and/or abatement of taxes erroneously and illegally assessed against and paid by it as a financial institution for the years 1947-1951, respectively, and by implication for abatement of similar taxes erroneously and illegally assessed, overpaid and collected for the year 1952, such taxes for the year 1952 having been paid July 23, 1952.

Copy of the finding and order of the Appellee from which appeal is taken, marked Exhibit A, is hereto attached and made a part hereof.

The finding and order of the Appellee are erroneous in the following respects, to wit:

1. In denying and not allowing Appellant's application or claim for refund and/or abatement for the years and in the amounts following, to-wit:

1947	$4,372.44	1949	$3,982.98
1948	$3,976.77	1950	$4,004.19
	1951 $4,204.03		

2. In not allowing Appellant's application and claim for abatement for the year 1952 in the amount of $4,840.43.

3. In not finding overpayments of the taxes assessed against the Appellant for the years 1947-1952 and each of them and ordering the refund thereof or issue of a Certificate of Abatement therefor.

4. The value of United States Government Bonds, including principal and accrued interest thereon, and stock of the Federal Home Loan Bank, a federal government instrumentality, were erroneously and illegally included in the tax base or formula for assessment of the deposits (or capital), reserves and undivided profits of the Appellant and thereby in legal effect the State of Ohio imposed an illegal tax upon such securities exempted by the provisions of U. S. Code Title 31, Section 742 and Title 12, Section 1433.

[fol. 19] 5. The Statutes of Ohio as construed and enforced by the order of the Tax Commissioner and the order of the Tax Commissioner unjustly and illegally discriminate against the Appellant, deprive it of prop-

erty without due process of law and deny it the equal protection of the laws contrary to the Fourteenth Amendment to the Constitution of the United States.

Wherefore Appellant prays that the finding and order of the Appellee be reversed, vacated, set aside, and held for naught; that the Appellant's claim for refund for the years 1947-1952 and each of them be allowed; that the Appellee be required to find the overpayments claimed and direct the refund and or abatement thereof as prayed for by Appellant; and for all such other relief to which Appellant may be entitled."

As will be noted in the final order of the Tax Commissioner complained of, that official made no order concerning the year 1952 and therefore, irrespective of the relief asked for the year 1952 in the notice of appeal, we only have jurisdiction to review the Tax Commissioner's order as issued—which is for the years 1947 through 1951; and lacking jurisdiction as to the year 1952 on the appeal now before us no consideration will be given as to the year 1952.

The final order of the Tax Commissioner complained of reads as follows:

"This day the application of First Federal Savings and Loan Association of Warren, Warren, Ohio, a financial institution for a Certificate of Abatement for the alleged overpayment of intangible taxes for the years 1947 through 1951 came on to be considered.

The taxpayer filed a timely application for a Certificate of Abatement for the years above mentioned contending that the taxes for said years were overpaid because the assessments included obligations of the United States. The tax commissioner finds that the application is based upon the decision of the Ohio Supreme Court in Wrenn Paper Company v. Glander, 156 O.S. 583, 158 O.S. 15, and Section 742, Title 31, United States Code.

[fol. 20] Upon consideration of all the available evidence the Tax Commissioner finds that the above decision applied to the Ohio franchise tax and is not dispositive of the issues raised by the applicant with respect to the intangibles tax.

Hence, the Tax Commissioner finds that there has been no overpayment for the years in question and it is therefore ordered that this application be and the same hereby is denied."

The agreed statement of facts filed with the Board of Tax Appeals under date of November 19, 1952, reads as follows:

"It is hereby stipulated and agreed by and between the parties hereto that the facts hereinafter stated are and shall be taken as true for all purposes in the above captioned case without further proof thereof, reserving to either party however the right to object to any part thereof upon the ground of relevancy or materiality and further reserving to each party the right and privilege to offer additional evidence on any matter.

1. First Federal Savings and Loan Association of Warren, Ohio (hereinafter called the "taxpayer") is and at all times hereinafter mentioned was a Federal Savings and Loan Association incorporated and existing under the laws of the United States, to-wit, the Home Owners' Loan Act of 1933 as amended (Title 12 U. S. C. Sec. 1464 et seq.) and having its principal place of business in Warren, Ohio and as such is and was an incorporated financial institution located in this state under the provisions of the tax laws of Ohio. It was originally incorporated in 1922 as "The Warren Savings and Loan Association" under the Building and Loan Laws of the State of Ohio and was converted to a Federal Savings and Loan Association in 1936.

2. The taxpayer has never had or issued any permanent or non-withdrawable shares or stock. All of the accounts of the shareholders or depositors in the taxpayer are and at all times involved herein, have been represented by savings share account pass books to which all deposits and dividends are credited and all withdrawals debited; all of such accounts were and are withdrawables shares of stock; i.e. the persons [fol. 21] owning, holding in trust or having the beneficial interest in such accounts have been and are entitled to withdraw any part or all the amounts cred-

ited to their savings share accounts and to make deposits therein.

3. The taxpayer is a member of the Federal Home Loan Bank of Cincinnati.

4. The following are true and correct extracts from the rules and regulations for the Federal Savings and Loan System promulgated by the Federal Home Loan Bank Board:

"§141.2 *Federal Association*—The term 'Federal association' means a Federal savings and loan association chartered by the Board as provided in section 5 of the Home Owners' Loan Act of 1933, as amended.

"§141.3 *Capital*—The term 'capital' means the aggregate of the payments on savings accounts in a Federal association, plus earnings credited thereto, less lawful deductions therefrom.

"§141.4 *Savings Account*—The term 'savings account' means the monetary interest of the holder thereof in the capital of a Federal association and consists of the withdrawal value of such interest.

"§141.6 *Withdrawal value*—The term 'withdrawal value' means the amount paid on a savings account in a Federal association, plus earnings credited thereto, less lawful deductions therefrom.

"§141.7 *General reserves*—The term 'general reserves' means the aggregate amount of reserves of a Federal association established by such association for the sole purpose of meeting losses. Any amount in a reserve for bad debts which is exclusively for bad debt losses, shall be deemed to be a part of the General Reserves and to be a part of the reserve for losses provided in the Charters of Federal associations which have a Charter E or a Charter K.

[fol. 22] "§ 141.8 *Surplus*—The term 'surplus' means the undistributed earnings of a Federal association which are held as unallocated reserves for general corporate use.

"§145.6-12 *Reserve for uncollected interest.* A 'Reserve for Uncollected interest' shall be main-

tained equivalent to all interest in default more than 90 days.

"§145.17 *Powers and duties*—When designated for that purpose by the Secretary of the Treasury a Federal association shall perform all such reasonable duties as fiscal agent of the Government specified by the Secretary of the Treasury. Such a Federal association shall exercise only such powers and privileges as a fiscal agent of the Government as are enumerated in regulations prescribed by the Secretary of the Treasury. When the designation for that purpose by any other instrumentality of the United States has been approved by the Board, a Federal association, upon qualification for such employment, shall perform the duties as agent of such instrumentality of the United States. Such a Federal association shall exercise only such powers and privileges as an agent of any other instrumentality of the United States as are prescribed by such other instrumentality of the United States."

The following are true and correct extracts from the rules regulations duly promulgated for the insurance of accounts under the National Housing Act as amended (Title 12 U. S. C. §1724 et seq.):

"§163.11 *Setting up, designation, and purpose of Federal Insurance reserve*—Each insured institution shall set up a Federal insurance reserve account which shall be used solely for the purpose of absorbing losses. No insured institution may pay dividends from its Federal insurance reserve account. Any insured state-chartered institution may by resolution of its board of directors or by other appropriate corporate action designate as its Federal insurance reserve account any reserve account which under the provisions of state law is established for the sole purpose of absorbing losses. Evidence of such action shall be filed with the Corporation. With the prior [fol. 23] written approval of the Corporation, any other reserve account which by specific and adequate corporate action of an insured institution is made

subject to charges for losses only, may be designated as its Federal insurance reserve account. The general reserves of Federal savings and loan associations operating under Charter K. or Charter N. are deemed to meet the requirements of this section. Any amount in a reserve for bad debts, which is exclusively for bad debt losses, shall be deemed to be a part of the Federal Insurance Reserve.

"§163.12 *Original credit to Federal Insurance reserve account*—During the fiscal year in which a certificate of insurance is issued to an insured institution, it shall credit to its Federal insurance account an amount at least equal to that fraction of three-tenths of one percent of all insurable accounts on the date of its latest financial statement or report in support of its application for insurance which the unexpired portion of its fiscal year from the date of such certificate is to its full fiscal year, calculated to the nearest month.

"§163.13 *Regular credits*—Each insured institution shall thereafter credit to its Federal insurance reserve, during each of its fiscal years, an amount equal to at least three-tenths of 1 percent of all insured accounts outstanding at the beginning of such fiscal year; and shall build up the Federal insurance reserve to an amount equal to at least 5 percent of all insured accounts within twenty years from such date: Provided, That credits to the Federal insurance reserve need not be made whenever such insurance reserve account equals or exceeds the minimum amounts required by this action. If for any reason, the Federal insurance reserve account of any institution which has been insured for at least twenty years is thereafter reduced to less than 5 percent of all insured accounts, such institution shall transfer to its Federal insurance reserve account, for each dividend period, at least 25 percent of its net operating income before the declaration of dividends or the payment of interest on savings, until its Federal insurance reserve account is again equal to at least 5 percent [fol. 24] of all insured accounts.

"§163.14 *Charging of losses and payment of dividends*—No insured institution which has charged losses to its Federal insurance reserve account shall declare any dividends or pay any interest on savings unless the amount standing to the credit of such account, after deduction of all charges, is equal to at least the amounts required under §163.13: *Provided*, That, for any year dividends may be declared or interest on savings paid when losses are charged to such reserve, if the declaration of such dividends or the payment of such interest on savings is first approved by the Corporation: *And provided* further, that the Corporation hereby approves, for any such insured institution which has been insured for a period of twenty years or more and whose Federal insurance reserve account, prior to the charging of such losses, equalled at least 5 percent of all insured accounts, the declaration of dividends and the payment of interest on savings if such insured institution shall have first transferred not less than 25 percent of its net operating income for the same dividend period to its Federal insurance reserve account."

5. The dates set by the Board of Tax Appeals under the provisions of General Code Section 5411-1 as of which the taxable deposits in financial institutions should be listed and assessed for the years involved herein are as follows:

Tax Year	
1947	November 7, 1946
1948	November 12, 1947
1949	November 4, 1948
1950	November 22, 1949
1951	November 14, 1950

6. The tax returns filed by the taxpayer and included in the transcript for the years involved herein are true and correct statements as to the items taken from the taxpayer's books of account. However, the taxpayer does not concede but contests the matters in issue herein including the conclusions in such returns relating to

the amounts of taxable deposits, to the taxable value [fol. 25] of shares or capital employed by the taxpayer, and the amount of taxes thereon.

7. The Tax Commissioner has assessed for the years and on or about the dates hereinafter set forth the taxpayer has paid the amount of financial institution taxes, set forth below, to wit:

Tax Year	Date of Payment	Amount
1947	July 7, 1947	$11,488.37
1948	July 7, 1948	13,562.70
1949	July 6, 1949	15,842.98
1950	July 6, 1950	17,182.64
1951	July 10, 1951	19,376.70

8. Upon the dates hereinafter set forth, the amount of bonds of the United States with accrued interest thereon held by the taxpayer and included in its balance sheet and the amount of Federal Home Loan Bank Stock held by the taxpayer and included in its balance sheet were as follows:

Date	U. S. Bonds & Interest	Federal Home Loan Bank Stock
November 7, 1946	$2,127,818.70	$58,400.00
December 31, 1946	1,929,485.42	58,400.00
November 12, 1947	1,929,157.08	58,400.00
December 31, 1947	1,929,985.92	58,400.00
November 4, 1948	1,929,654.86	60,000.00
December 31, 1948	1,931,489.64	60,000.00
November 22, 1949	1,929,757.54	70,000.00
December 31, 1949	1,932,096.72	70,000.00
November 14, 1950	2,030,263.38	70,000.00
December 31, 1950	2,032,013.07	70,000.00

9. All of the returns referred to herein, the claims for refund and abatement, and notice of appeal were duly and regularly filed and the taxes were paid within the times required by law.

10. Upon the conversion of the Warren Savings and Loan Association into a Federal Savings and Loan Association in 1936, the total number of depositors or shareholders was 1677.

[fol. 26] The number of savings share accounts of the taxpayer at the beginning, the number of new accounts opened and the number of accounts closed, in each of the years involved herein were and are as follows:

Year	Number at Beginning	New Accounts	Accounts Closed
1947	4958	1772	1038
1948	5692	2094	1159
1949	6627	1732	1287
1950	7072	3487	2756
1951	8479	3475	2799

The pertinent portion of General Code Section 1464-3 (2), by virtue of which the appellant filed its application for a certificate of abatement with the Tax Commissioner, reads as follows:

> "* * *. On written application of any person, firm or corporation claiming to have overpaid to the treasurer of state, at any time within five years prior to the making of such application but not prior to January 1, 1938, any tax payable under any law which the department of taxation is required to administer, or on his own motion, to investigate the facts and to make, in triplicate, a written statement of his findings; and, if he shall find that there has been an overpayment, issue, in triplicate, a certificate of abatement, payable to the taxpayer or his or its assigns or legal representative and showing the amount of the overpayment and the kind of tax overpaid. * * *."

The question presented to us for solution can therefore be stated as follows:

Was the Tax Commissioner in error----

(1) In not finding that the appellant had overpaid its intangible taxes for the years 1947 through 1951, and

(2) In not issuing certificates of abatement to appellant in the proper amount?

or to state the question in another way:

> [fol. 27] Was the Tax Commissioner in error in including in the tax base the value of federal securities owned by appellant in assessing, pursuant to Section 5412, General Code, the value of "property representing the capital employed by appellant (financial institution), the capital of which financial institution is not divided into shares?

Upon a consideration of this case as thus presented we find that this appellant is in the same category as the Society for Savings in the City of Cleveland insofar as its capital is not divided into shares and insofar as it thus has no permanent shareholders. And, falling within the same classification, this appellant must be afforded the same relief as given to the Society for Savings in the City of Cleveland (Case No: 22464—decided by the Board of Tax Appeals under the same date as this entry, the contents and reasoning of which are to be considered as a part of this entry insofar as the same are applicable to the facts).

Our investigation discloses that the appellant has listed in its return and has paid the tax on deposits as assessed by the Tax Commissioner for the years in question, as follows:

Year	Deposits	Tax
1947	$5,368,540	$10,737.08
1948	6,327,680	12,655.36
1949	7,364,640	14,729.28
1950	7,920,990	15,841.98
1951	8,893,480	17,786.96

As to these deposits and the tax paid thereon we find that there was no error. The tax is upon the deposits and not upon any federal securities; and the tax is not a tax against appellant as an entity but is a tax which is assessed against the deposits themselves and is a tax which is authorized by law to be passed on to individual depositors; and "deposits", as defined by Section 5324, Ohio General Code, includes withdrawable stock—which stock by its very nature is not a permanent part of appellant's capital.

Our investigation discloses that appellant has listed in

its returns and has paid the tax on "capital" as assessed by the Tax Commissioner for the years in question, as follows:

[fol. 28]

Year	Surplus reserves and undivided profits	Tax
1947	$375,640	$ 751.28
1948	453,670	907.34
1949	556,850	1,113.70
1950	670,330	1,340.66
1951	794,870	1,589.74
	Total	$5,702.72

We also find that the appellant, for each of the years in question, has listed in its return under a heading devoted "Resources" items of "Obligations of U. S. and Federal Instrumentalities" in an amount of approximately $2,000,000. Obviously if the amount of federal securities in each year is deducted from the total of "Surplus, reserves and undivided profits" for each year, the computation will result in a negative figure upon which no tax would be due. And having paid the tax thereon and having, within time, applied for a certificate of abatement with reference thereto, the appellant is entitled to have the same issued to him.

It is therefore considered and ordered that the final order of the Tax Commissioner herein complained of be reversed and that this cause be remanded to that official with instructions to issue to appellant, for the years 1947 through 1951, a certificate of abatement for the overpayment of intangible taxes in the amount of $5,702.72.

I hereby certify the foregoing to be a true and correct copy of the action of the Board of Tax Appeals of the Department of Taxation this day taken with respect to the above matter.

(S.) Francis P. Howard, Secretary

(Seal)

[fols. 28a-44] *Entry of Board of Tax Appeals* in companion case of Society for Savings in the City of Cleveland v. John W. Peck, Tax Commissioner of Ohio, B.T.A. No. 22464, appearing in certified transcript at this point is omitted since it is printed in the record in No. 204, O. T. 1954.

[fol. 45] IN THE SUPREME COURT OF OHIO

Case No. 33525

FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF WARREN, Appellee,

v.

JOHN W. PECK, Tax Commissioner of Ohio, Appellant

OPINION

Appeal from the Board of Tax Appeals

The First Federal Savings and Loan Association of Warren, herein referred to as applicant, is incorporated under federal statutes and has only withdrawable shares.

It filed with the Tax Commissioner an application pursuant to subdivision 2 of Section 1464-3, General Code, for a certificate of abatement for alleged overpayment of taxes assessed pursuant to Sections 5406 to 5414, General Code, and levied pursuant to Section 5638-1, General Code, (1) on "the amount of its deposits" (its withdrawable shares being defined by Section 5324, General Code, as deposits) and (2) on "the capital employed, or the property representing it, in" that institution.

It appeared that, if the amount of federal securities and the value of federal home loan bank stock owned by the applicant were deducted from the amount of its total assets, the remaining amount would be less than the amount of its withdrawable shares or deposits. The applicant claimed that the Tax Commissioner should not have taxed with-[fol. 46] drawable shares of the institution as deposits at more than that remaining amount and should not have assessed any tax on "the capital employed, or the property representing it, in" the institution.

This application was denied by the Tax Commissioner. On appeal to the Board of Tax Appeals, the order of the Tax Commissioner was affirmed only so far as it related to taxes on the shares as deposits, and the Tax Commissioner was directed to issue the certificate of abatement requested so far as it related to taxes assessed on "the capital employed, or the property representing it, in" the institution.

In case No. 33524, the applicant has appealed to this court from that part of the decision of the Board of Tax Appeals which affirmed the order of the Tax Commissioner. In case No. 33525, the Tax Commissioner has appealed to this court from that portion of the decision of the Board of Tax Appeals which reversed the order of the Tax Commissioner.

OPINION

PER CURIAM.

For the reasons which we gave in support of our judgment in *Society for Savings in City of Cleveland* v. *Peck, Tax Commr., ante*, 122, we are of the opinion that the taxes involved in the instant cases, so far as they relate to "the surplus or reserve fund and the undivided profits" of the [fol. 47] corporation, are taxes on the intangible property interests of the owners of the corporation representing their capital employed in the corporation, and those taxes are not taxes on the corporation or on the capital or the assets of the corporation. See also last sentence of Section 5412, General Code, and discussion thereof in *Society for Savings* v. *Peck, Tax Commr., supra.*

So far as the taxes involved in the instant cases relate to taxes on the withdrawable shares of the corporation as deposits, such taxes are clearly taxes levied against the owners of the deposits. See Sections 5406, 5324, 5412, 5412-1, 5638-1, 5673-1 and 5673-2, General Code.

In addition, the First Federal Savings & Loan Association of Warren has argued that its shares are exempt from taxation by reason of the provisions of Section 5323, General Code, reading:

"The term 'investments' as used in this Title, includes the following:

"Shares of stock in corporations, associations and joint stock companies, under whatever laws organized or existing, excepting (1) those in such corporations and associations as constitute instrumentalities of the federal government for the taxation of which by the several states no provision is made by the act of the Congress of the United States, (2) those in financial institutions, dealers in intan- [fol. 48] gibles and domestic insurance companies as defined by Chapter four of this Title, and (3) such as are defined in this Chapter as 'deposits.' "

It is contended by the corporation that it comes within the first numbered exception. But see 12 U.S. Code, Section 1464h. However, it definitely is described by the words in the second numbered exception which read, "financial institutions * * * as defined by Chapter Four of this Title (including Sections 5406 to 5414, General Code)." Likewise, Section 5324, which is in the Chapter in which Section 5323 appears, defines withdrawable shares, such as those of this corporation, as "deposits." Section 5406 does refer to Section 5324, General Code. Otherwise there is nothing in the assessment sections here involved (Sections 5406 to 5414, inclusive, General Code) which do refer to the Chapter in which Section 5323 is found. As held in *Broadview Savings & Loan Co.* v. *Peck, Tax Commr., ante*, 119, the provisions of Section 5323, General Code, are not to be read *in paria materia* with Sections 5406 to 5414, inclusive, General Code. Nothing in those sections justifies any reference to the exception relied upon by applicant in Section 5323, General Code.

Finally, it is argued that, since such a tax cannot be imposed on the owners of an unincorporated financial institution without deducting federal securities in the computation of the tax, such a deduction must also be made in computing [fol. 49] the tax where, as here, an incorporated financial institution carrying on the same line of business is involved. We believe that the decision and the reasoning of the Supreme Court of the United States in *Des Moines National Bank* v. *Fairweather, Mayor*, 263 U.S., 103, 68 L. Ed., 191, 44 S. Ct., 23, is a complete answer to any such argument.

The decision of the Board of Tax Appeals so far as it

relates to case No. 33524 is affirmed and so far as it relates to case No. 33525 is reversed.

Judgment accordingly.

Weygandt, C. J., Middleton, Taft, Hart, Zimmerman and Lamneck, JJ., concur.

Stewart, J., concurs so far as the decision of the Board of Tax Appeals is affirmed and dissents so far as such decision is reversed.

[fols. 49a-85] *Opinions* in companion case of Society for Savings in the City of Cleveland v. John W. Peck, Tax Commissioner of Ohio, No. 33523, appearing in certified transcript at this point are omitted since they are printed in the record in No. 204, O.T. 1954.

[fol. 86] IN THE SUPREME COURT OF OHIO

No. 33525

APPLICATION FOR REHEARING—Filed March 24, 1954

Now comes First Federal Savings and Loan Association of Warren, (hereinafter called the "Tax*a*pyer") Appellant in Cause No. 33524 and Appellee in Cause No. 33525 aforesaid and makes application to the court for a rehearing in each of such causes, for reversal of the order of the Board of Tax Appeals in Cause No. 33524 and for affirmance of the order of the Board of Tax Appeals in Cause No. 33525 upon the grounds and for the reasons hereinafter set forth.

(References herein will be to the pages of the official opinions in these cases, 161 O. S. 149 et seq., and in the companion opinion in *Society v. Peck*, 161 O. S. 122 et seq.)

The majority opinion failed to pass expressly upon the principal questions presented in these cases, to-wit, whether the statutes of Ohio construed to deny the deduction of Federal securities from the tax base for the assessment of the taxes involved herein would violate the provisions of [fol. 87] the Federal statutes exempting from taxation the

value of such securities and whether the statutes so construed are repugnant to the Constitution of the United States. These questions are presented on Page 3 of the brief of First Federal and on Page 2 of its Reply and Answer Brief. We believe that the majority opinion necessarily implies that the statutes construed by the court are not violative of the Federal Statutes and are not repugnant to the Constitution of the United States; nevertheless, we ask that the court specifically pass upon those points in order that there be no question of jurisdiction upon appeal to the Supreme Court of the United States.

The opinion presents an additional basis of unconstitutionality. As construed by the Court, the statutes would impose upon the deposits in each institution two separate taxes, i. e. a tax of two mills on the dollar of the amounts of the deposits and another tax of two mills on the dollar on the amount of the capital employed by the financial institution, that is, upon its surplus, reserves and undivided profits. This is double-taxation—two personal property taxes assessed against the same property—and results in depriving the Taxpayer of property without due process of law and denying it the equal protection of the laws contrary to the Fourteenth Amendment to the Constitution of the United States. The Supreme Court of the United States in *Senior v. Braden*, 295 U. S. 422, 55 S. Ct. 800 reversing the [fol. 88] decision of this court in 128 O. S. 597 held that the Ohio intangible tax upon investments in land trust certificates representing interests in land which were also subject to real estate taxes was double taxation contrary to the Fourteenth Amendment. The depositors in Society for Savings and in the Taxpayer here are no different from the depositors in banks or savings and loan associations having permanent shares or capital stock yet their deposits, under the decisions announced, would be taxed doubly whereas the depositors in institutions having permanent shares or capital stock would be taxed only upon the withdrawal value of their deposits and this despite the fact that in each case the depositors have the protection of the reserves and undivided profits behind them guarding against any loss. This cannot be justified on the ground that there are two different kinds of property—the deposits on the one hand and the reserves and undivided profits on the other; for their rights are in-

separable. So long as the depositor maintains his deposit, he has the protection of the surplus, reserves and undivided profits; but he cannot withdraw his deposit without losing that protection; hence, if there were any ownership interest coupled with the deposit, the two would constitute only one item of property and not two separate items. No value is added by surplus, reserves and undivided profits and the additional tax on deposits would be confiscatory.

The taxes involved were in fact and in law levied and [fol. 89] assessed against the property of the Taxpayer as a financial institution, and were so designated in the tax bills therefor (Appellant's Exhibits 5, 6, 7, 8 and 9) which read "Tax Bill For Personal Property of Financial Institutions" and were not assessed or levied upon intangible property interests of Taxpayer's depositors.

In the case of the tax upon the surplus or reserves and undivided profits just as in the case of *Home Savings Bank v. Des Moines*, 205 U. S. 503, 519 the statute requires the corporation not merely primarily, but finally, to pay the tax. There is no provision of law for recovery of such tax from the depositors even if it be construed as a tax upon them.

The majority opinions erroneously construe the words "capital" and "the property representing it" in the statutes involved as meaning a part of the interest or claim of the depositor in or against the corporation rather than as describing the property and assets subject to its liabilities. We submit that semantics of the majority opinions lead to one conclusion and then jump to the other. The proper distinction is between the capital stock or shares of or in the institution on the one hand and the capital of, employed by, or in, the institution on the other. That distinction is clearly observed in this court's quotation (pp. 127-128) from *National Bank* v. *Commonwealth*, 76 U. S. (9 Wall.) 353 and the other opinions from which the court quotes. [fol. 90] The same distinction is found in G. C. §5408 which provides for the assessment of *shares of stockholders* in a financial institution the capital stock of which is divided into shares, in two different clauses depending on whether the institution is incorporated or unincorporated, and in another clause the *capital employed* or *the property representing it* in an institution the capital stock of which is not divided into shares or which has no capital stock. The

terminology used with respect to the taxation of interests of the shareholders is "shares" or "capital stock", whereas the terminology used generally with reference to the interests and property of the institution is "capital" or "the property representing it." So in G. C. #5412 provision is made for the assessment of the taxable shares of the institution in one case and the value of the property representing the capital employed by the institution in the other case, i. e., in case of an institution whose capital is not divided into shares; and in the case of an incorporated financial institution all of whose shares are deposits as defined in G. C. #5324, the assessment of shares shall exclude the capital stock thereof (i. e., the interest of the depositors) but shall include the surplus or reserve and undivided profits. This last sentence of G. C. #5412 does not refer to the case of "shareholders" in an incorporated financial institution of that sort but to the case of the "institution" [fol. 91] itself. The deposits and the capital measured by surplus, reserves and undivided profits (excluding the capital stock or interest of the depositors) are separately taxed as of different dates to the institution.

G. C. #5638-1 imposes one tax on deposits, another tax on shares in and capital employed by financial institutions.

This court's quotation (p. 129) from *Van Allen v. Assessors*, 70 U. S. (3 Wall.) 573, 583, does not support the definition of capital adopted by this court in the cases at bar. The quotation begins,

> "* * * the tax on the *shares* is not a tax on the *capital* of the bank"

and proceeds in the next paragraph,

> "The interest of the shareholder entitles him to participate in the net profits of the bank in the employment of its *capital* during the existence of its charter, in proportion to the number of his shares." (emphasis ours)

We do not believe that "on a hasty reading" or, *a fortiori*, on a careful reading the words "capital employed or property representing it" found in G. C. #5408 or the words "value of the property representing the capital em-

ployed by such financial institution not divided into shares" found in G. C. #5412 may reasonably be argued as describing the interest or claim of depositors in or against the institution. Those words are contrasted with the words "shares" and "capital stock" and, we submit, were used in the statutes with a fair degree of accuracy to express the [fol. 92] intention of the legislators. The statutes indicate a rather comprehensive intention to tax on a comparable basis various property interests in and of financial institutions under a number of varying circumstances. In the case of incorporated institutions having permanent capital stock or shares, a tax is imposed upon those shares, the property interest of the shareholders or stockholders. In the case of an unincorporated association having capital stock divided into shares, the tax is imposed likewise upon the shares but in such instance there is no corporate entity intervening, and the property of the institution is the property of the shareholders therein, regardless of whether it is defined as being held in shares or in fractional interests. The third situation is that of an institution having no shares, the mutuals like Society for Savings in the City of Cleveland and First Federal which has no true shares but whose shares are deposits. Incidentally, although it is not in the record, the Federal Home Loan Bank Board has recently prescribed and the Taxpayer has this year adopted a new form of charter in which the term "shares" no longer appears but instead the words "savings accounts" are used. Obviously, in the case of institutions without permanent capital but having only deposits (or so-called withdrawable share accounts which are defined in the law—G. C. #5324—as deposits) the assessment against them must be limited to the amounts which are withdrawable. These amounts [fol. 93] vary from day to day as the depositors make additional deposits or withdrawals from their accounts and as shown in the record, numerically, there is a complete change in the accounts by closing of old accounts and opening of new accounts every three years or about one-third of all accounts each year. The reserves are required by law and while liquidation is possible, there is no occasion for liquidation and distribution thereof short of losses or business reverses sufficient to wipe out the reserves so as in the opinion of the examining officer no longer to justify the

hazard to the public and the Federal Savings and Loan Insurance Corporation of continuing longer in business; but in the meantime, such inchoate interest as any depositor may have is lost upon the withdrawal of his deposit and may be watered down to substantially nothing by increased deposits of others. Society for Savings has been in business for over 100 years and Taxpayer for 32 with no hope in any depositor of realizing on any inchoate right in its reserves.

We submit that the terms "capital", "the capital employed by" or "the capital employed in" a financial institution or "the property representing it" are used in the case of institutions not having permanent capital stock to describe property owned by the institution, not property interests claims of individuals in or against the institution. The argument that the construction contended for by the taxpayers in these cases imputes to the General Assembly [fol. 94] the excessive or wasteful use of words, defeats itself. Perhaps it is too much to attribute to the legislature perfection and the most economical use of words and an intent not to use any words which do not describe or apply to something already described or covered. If the minimum use of words were a requisite, G. C. #5408 might well be still further condensed to read

> "All the shares of stockholders in an incorporated financial institution located in this state having capital stock divided into shares, excepting such as are defined in #5324 of the General Code as deposits, and the property representing capital in financial institutions not incorporated or which have no capital stock other than deposits shall be listed and assessed at the book value thereof and taxed in the manner provided in this chapter"

saving more than nine words. This is only by way of example. If the interpretation declared by the Court of the aim and meaning of the Legislature were correct, G. C. ##5408, 5412, 5638 and 5638-1 might well be consolidated into a single section levying and assessing a tax of five mills on the dollar against the interests and claims of shareholders, partners, proprietors and depositors in and against the

financial institution. Nor should this Court yield to the Legislature in economy of expression.

The word "capital" whether used in conjunction with the words "in", "of", "employed by" or "employed in" refers, we submit, to the property which the corporation employs or uses in the transaction of its business. It includes in the case of a financial institution, the real prop [fol. 95] erty on which it transacts its business, the cash on hand and on deposit with other institutions, notes, mortgages, bonds and other property and assets used in carrying on its business subject, of course, to its debts. The capital or property of the institution is generally distinguished from the interests of its shareholders and creditors by the use in describing the latter of the terms "capital stock" or "shares."

We submit that it is reasonable to impute to the General Assembly an intent to provide for taxing the property of the institution in cases where that is necessary by reason of the nature of the institution to equalize the taxation of shares in institutions having permanent stock. It is only in the cases of the shares in incorporated institutions and deposits that a tax can possibly be assessed or any one other than the institution itself. In case of an unincorporated institution whether or not divided into shares the opinion is in error; no corporate entity intervenes and the property of the proprietor, proprietors or partners is the property of the institution itself whether it be described as shares, capital, capital employed, or property representing it, or aliquot interests therein. In an incorporated institution not having permanent shares or in an unincorporated institution, the taxable equivalent of permanent shares is the capital employed by it—the property of the institution.
[fol. 96] Unlike the statute of Iowa described in the quotation (p. 133) from *Des Moines National Bank* v. *Fairweather*, 263 U. S. 103, our statutes do not provide that except for real estate "the property of such corporation shall not be otherwise assessed." G. C. #5409 provides:

> "The real estate of a financial institution shall be taxed in the place where it is located, in like manner as the real estate of persons is taxed; but the tax provided for in this chapter shall be in lieu of all other

taxes on the other property and assets of such institution."

The taxes provided in this chapter are in lieu of all other taxes on other property, i. e., personal property; but in cases where there are no permanent shares to tax and discrimination would result from the differences in organization, this chapter imposes a tax upon the property of the corporation, contrary to the statute involved in the *Fairweather* case.

We submit that in the case of First Federal Savings and Loan Association of Warren the Legislature did not intend G. C. #5412 as imposing two assessments against deposits but as assessing one tax on deposits whether they be construed as a tax on depositors or on the institution and another tax on the surplus or reserves and undivided profits to be assessed against and paid by the institution itself.

The majority opinion (p. 137) attempts to meet the fact of any provision for passing on to the depositors the tax based on surplus, reserves and undivided profits by saying [fol. 97] that the inability to pass the tax on results in substance in passing the tax on by reducing the amount of profits available for dividends or interest to the extent of the taxes paid. This also goes to illustrate the fallacy of counting the number of words used to determine the intent of the legislature since, if this were true, the provisions of G. C. ##5672, 5673, 5673-1 and 5673-2 were unnecessary. The tax would have been valid and constitutional upon the theory of the majority opinions even though there were no provision whereby the bank could reimburse itself for the tax paid upon the deposits or shares owned by its depositors or shareholders. In this very situation, however, the Supreme Court of the United States held a similar law of Iowa unconstitutional because it contained no provision for reimbursement of the bank for taxes paid if they be construed to be paid in behalf of the depositors and shareholders. *Home Savings Bank v. Des Moines*, 205 U. S. 503.

We realize that the court is eager to protect the revenues of the state and likewise that a substantial amount of tax is involved in allowing the deduction of Federal Securities from tax base of personal property taxes and that where

such deduction is allowed in the case of unincorporated institutions and in the case at least of surplus, reserves and [fols. 98-99] undivided profits or property representing them in mutual institutions having no permanent capital stock, similar right of deduction is claimed by institutions having permanent capital stock or shares in order to avoid discrimination; but the fiscal power of the Federal Government is likewise entitled to protection. The Constitution and the statutes of the United States compel the allowance of deduction for stock and obligations issued by the government and its instrumentalities.

If the revenues of the state be seriously affected, the remedy is for the Legislature, not the Court, to declare.

Respectfully submitted, (S.) Robert C. Day, Attorney for First Federal Savings and Loan Association of Warren.

[File endorsement omitted.]

[fol. 100] In the Supreme Court of Ohio

No. 33525

[Title omitted]

Memoranda of Pleadings, Etc., Filed, Writs Issued, Etc., Judgments, Orders and Decrees

Date

April 1, 1953. Notice of Appeal filed. 4-6-53 proof of service filed.

April 18, 1953. Transcript of Record & Abstract of Docket (same as 33524) filed.

April 18, 1953. Cause docketed.

May 19, 1953. Papers taken by Rodenfels. 6-23-53, returned.

May 26, 1953. Entry extending time for filing appellant's brief to November 1, 1953, appellees' brief to December 1, 1953. Carl V. Weygandt, C. J. J. 40 page 613.

June 26, 1953. Printed brief of First Federal Savings & Loan Association filed and proof of service filed.

Date

June 26, 1953. Printed record filed.

August 25, 1953 Printers receipted bill filed.

[fol. 101] November 2, 1953. Brief of Tax Commissioner filed. 11 4 53 proof of service filed.

January 14, 1954. Leave to file Appellee's Answer brief instanter filed.

January 14, 1954. Appellee's non printed brief filed. 1 15 54 proof of service filed.

March 10, 1954. Decision Reversed. J. 41, page 149.

March 16, 1954. Notified application for rehearing to be filed.

March 24, 1954. Application for rehearing filed. 3 26 54 proof of service filed.

March 31, 1954. Rehearing denied. J. 41, page 176.

May 27, 1954. Entry substituting Stanley J. Bowers for John W. Peck, as Tax Commissioner approved. Carl V. Weygandt. C. J. J. 41, page 217.

June 23, 1954. Petition for appeal filed.

June 23, 1954. Order allowing appeal filed.

June 23, 1954. Assignments of Error and prayer for reversal filed.

June 23, 1954. Statement in support of jurisdiction filed.

June 23, 1954. Statement required by paragraph 2, Rule 12 of the Rules of the U. S. Supreme Court filed.

June 23, 1954. Bond in sum of $250.00 Aetna Casualty & Surety Company, as surety, approved and filed.

June 23, 1954. Citation issued, returned & filed.

June 23, 1954. Precipe for transcript of Record filed.

July 7, 1954. Statement in Opposition to Appellant's Statement of Jurisdiction and Motion to Dismiss or Affirm filed.

[fol. 102] May 26, 1953. Entry: With approval of the parties it is hereby ordered:

1. That the exhibits received in evidence or made a part of the record by way of proffer in each of the above cases need not be printed.

2. The time for filing the printed portion of the record in each of the above cases is extended to and including July 15, 1953.

3. The dates for filing of briefs in each of the above cases shall be as follows:

Appellant's opening brief in Case No. 33524, September 15, 1953;

The brief of the Tax Commissioner in each case, November 1, 1953;

Appellant's reply brief in Case No. 33524, November 20, 1953;

Appellees' briefs in cases No. 33523 and No. 33525, December 1, 1953.

Wednesday, March 10, 1954.

JUDGMENT

This cause came on to be heard upon the transcript of the Record of the Board of Tax Appeals and was argued by counsel. On consideration whereof, it is ordered and adjudged by this court, that the decision of the said Board of Tax Appeals be and the same hereby is reversed for the reasons stated in the opinion rendered herein, and said cause is remanded to the Board of Tax Appeals for further proceedings in accordance with the opinion rendered herein.

It is further ordered that appellant recover from appellee his costs herein expended taxed at $—— for which execution is awarded.

Ordered, That a special mandate be sent to the Board of Tax Appeals, to carry this Judgment into Execution.

[fols. 103-171] ORDER DENYING REHEARING—March 31, 1954

Upon consideration of the above application for rehearing, it is ordered by the Court that rehearing be, and the same hereby is, denied.

Thursday, May 27, 1954. Entry: It appearing that pending the appeals in the above captioned cases Stanley J. Bowers has succeeded John W. Peck in the office of the Tax Commission of Ohio it is

Ordered that Stanley J. Bowers, Tax Commissioner be and he is hereby substituted as appellee in Cause No. 33524 and as appellant in Cause No. 33525.

[fol. 172] BEFORE THE DEPARTMENT OF TAXATION OF OHIO

In the Matter of the Application of First Federal Savings and Loan Association of Warren, Warren, Ohio, a Financial Institution, for a Certificate of Abatement for the Alleged Overpayment of Intangible Taxes for the Years 1947 Through 1951.

APPLICATION FOR CERTIFICATE OF ABATEMENT—Filed July 3, 1952

The Tax Commissioner
Tax Department of Ohio
State Office Building
Columbus, Ohio

Dear Sir:

Re: First Federal Savings and Loan Ass'n of Warren, 175 E. Market Street, Warren, Ohio. Claim for Refund and Abatement of Taxes on Financial Institutions.

First Federal Savings and Loan Association of Warren (hereinafter called the "taxpayer") hereby makes claim for refund and/or abatement of taxes and assessments, illegally and erroneously assessed for each of the years 1947 to 1952, both inclusive, overpaid and collected by the state of Ohio for each of the years 1947 to 1951, both inclusive, together with interest thereon, from the time of payment.

The taxpayer is a federal savings and loan association organized and existing under the laws of the United States [fol. 173] and under such laws was and is required to hold stock in the Federal Home Loan Bank, a federal government instrumentality, in the amounts hereinafter listed. The period involved are the calendar years 1947 to 1952, both inclusive.

The character of the tax involved is the tax assessed against the taxpayer as a financial institution upon the basis of its deposits, capital, surplus or reserves, and undivided profits.

The time within which this claim may be legally filed has not expired.

The years involved, the total amount of deposits, capital,

reserves and undivided profits returned and used as the tax base upon which the assessment was made, the total tax assessed, the amounts illegally and erroneously included in the tax base representing the principal and interest upon bonds of the United States and stock of the Federal Home Loan Bank (a federal instrumentality) both of which are exempt from tax and the amount overpaid and of which refund is claimed for each year are as follows:

(1)	(2)	(3) Amount Illegally & Erroneously Inc.		(4)	(5)	(6)	(7)
Year	Total Amount Returned	*U. S. Bonds and Interest	F.H.L.B. Stock		Total Tax Assessed or Paid	Date Paid	Refund Claimed
1947.....	$ 5,744,182.68	$2,127,818.70	$ 58,400.00		$11,488.37	7- 7-47	$4,372.44
1948.....	$ 6,781,350.00	$1,929,985.89	$ 58,400.00		$13,562.70	7- 4-48	$3,976.77
1949	$ 7,921,490.00	$1,931,489.64	$ 60,000.00		$15,842.98	7- 6-49	$3,982.98
1950	$ 8,591,320.00	$1,932,096.72	$ 70,000.00		$17,182.64	7- 6-50	$4,004.19
1951	$ 9,688,350.00	$2,032,013.07	$ 70,000.00		$19,376.70	7-10-51	$4,204.03
1952	$10,656,760.00	$2,286,216.83	$134,000.00		$21,313.52	—	$4,840.43

(* The amounts shown in column (3) are as of December 31 of the preceding year in each case except for the year [fol. 174] 1947, which is shown as of the date prescribed for assessment of deposits, to wit: November 7, 1946. The amount of bonds and accrued interest on December 31, 1946 was $1,929,485.42.)

The obligations of the United States including the principal and accrued interest on bonds issued upon it and stock of the Federal Home Loan Bank were erroneously and illegally included in the tax base—Wren Paper Company v. Glander (and five other cases) O. S. 583 and authorities cited therein; Title 31 U. S. C. Section 742; Title 12 U. S. C. Section 1433; and Rosch v. First Savings & Loan Association, 203 S. W. 2d 1006.

Wherefore, the taxpayer claims that the taxes upon its deposits, capital, reserves and undivided profits have been overpaid as aforesaid and asks that the Tax Commissioner investigate the facts, find such overpayment, and direct the refund and/or abatement of such taxes to the extent of such overpayment with interest thereon from the several dates

of payment, and for all other relief to which it may be entitled.

Respectfully,

First Federal Savings and Loan Association of Warren by Robert G. Day, Attorney.

[Duly verified.]

[fol. 175] BEFORE THE DEPARTMENT OF TAXATION

ORDER DENYING APPLICATION—Dated July 30, 1952

This day the application of First Federal Savings and Loan Association of Warren, Warren, Ohio, a financial institution, for a certificate of abatement for the alleged overpayment of intangible taxes for the years 1947 through 1951 came on to be considered.

The taxpayer filed a timely application for a certificate of abatement for the years above mentioned contending that the taxes for said years were overpaid because the assessments included obligations of the United States. The Tax Commissioner finds that the application is based upon the decision of the Ohio Supreme Court in Warren Paper Company v. Glander, 156 O. S. 583, 158 O. S. 15, and Section 742, Title 31, United States Code.

Upon consideration of all the available evidence the Tax Commissioner finds that the above decision applied to the Ohio franchise tax and is not dispositive of the issues raised by the applicant with respect to the intangibles tax.

Hence, the Tax Commissioner finds that there has been no overpayment for the years in question and it is therefore ordered that this application be and the same hereby is denied.

Department of Taxation John W. Peck, Tax Commissioner.

[fol. 176] BEFORE THE BOARD OF TAX APPEALS

[Title omitted]

NOTICE OF APPEAL—Filed August 27, 1952

Now comes the appellant, First Federal Savings and Loan Association of Warren, whose principal office and place of business is at 175 East Market street, Warren, Ohio and gives notice of appeal to the Board of Tax Appeals of Ohio from a finding and order of the appellee, John W. Peck, Tax Commissioner of Ohio, dated July 30, 1952, and mailed July 31, 1952, denying appellant's application and claim for refund and/or abatement of taxes erroneously and illegally assessed against and paid by it as a financial institution for the years 1947-1951, respectively, and by implication for abatement of similar taxes erroneously and illegally assessed, overpaid and collected for the year 1952, such taxes for the year 1952 having been paid July 23, 1952.

Copy of the finding and order of the appellee from which appeal is taken, marked Exhibit A, is hereto attached and made a part hereof.

The finding and order of the appellee are erroneous in the following respects, to wit:

[fol. 177] 1. In denying and not allowing appellant's application or claim for refund and/or abatement for the years and in the amounts following, to wit:

1947	$4,372.44	1949	$3,982.98
1948	$3,976.77	1950	$4,904.19
	1951	$4,204.03	

2. In not allowing appellant's application and claim for abatement for the year 1952 in the amount of $4,840.43.

3. In not finding overpayments of the taxes assessed against the appellant for the years 1947-1952 and each of them and ordering the refund thereof or issue of a certificate of abatement therefor.

4. The value of United States Government Bonds, including principal and accrued interest thereon, and stock of the Federal Home Loan Bank, a federal government instrumentality, were erroneously and illegally included in the

tax base or formula for assessment of the deposits (or capital), reserves and undivided profits of the appellant and thereby in legal effect the state of Ohio imposed an illegal tax upon such securities exempted by the provisions of U. S. Code Title 31, Section 742 and Title 12, Section 1433.

5. The statutes of Ohio as construed and enforced by the order of the Tax Commissioner and the order of the Tax Commissioner unjustly and illegally discriminate against the appellant, deprive it of property without due process of law and deny it the equal protection of the laws contrary to the Fourteenth Amendment to the Constitution of the United States.

Wherefore appellant prays that the finding and order of the appellee be reversed, vacated, set aside, and held for naught; that the appellant's claim for refund for the years [fol. 178] 1947-1952 and each of them be allowed; that the appellee be required to find the overpayments claimed and direct the refund and/or abatement thereof as prayed for by appellant; and for all such other relief to which appellant may be entitled.

First Federal Savings and Loan Association of Warren, by Geo. H. Watson, President, Robert G. Day, Attorney.

EXHIBIT A

[Omitted here in printing. Printed, supra.]

BEFORE THE BOARD OF TAX APPEALS

STIPULATION OF FACTS—Filed November 19, 1952

It is hereby stipulated and agreed by and between the parties hereto that the facts hereinafter stated are and shall be taken as true for all purposes in the above captioned case without further proof thereof, reserving to either party however the right to object to any part thereof upon the ground of relevancy or materiality and further reserving

to each party the right and privilege to offer additional evidence on any matter.

1. First Federal Savings and Loan Assoc-ation of Warren, Ohio (hereinafter called the "taxpayer") is and at all times hereinafter mentioned was a Federal Savings and Loan Association incorporated and existing under the laws of the United States, to wit, the Home Owners' Loan Act of 1933 as amended (Title 12 U. S. C., Section 1464, et seq.) and having its principal place of business in Warren, Ohio, and [fol. 179] as such is and was an incorporated financial institution located in this state under the provisions of the tax laws of Ohio. It was originally incorporated in 1922 as "The Warren Savings and Loan Association" under the Building and Loan Laws of the state of Ohio and was converted to a Federal Savings and Loan Association in 1936.

2. The taxpayer has never had or issued any permanent or non-withdrawable shares or stock. All of the accounts of the shareholders or depositors in the taxpayer are and at all times involved herein, have been represented by savings share account pass books to which all deposits and dividends are credited and all withdrawals debited; all of such accounts were and are withdrawable shares or stock; i.e., the persons owning, holding in trust or having the beneficial interest in such accounts have been and are entitled to withdraw any part or all of the amounts credited to their savings share accounts and to make deposits therein.

3. The taxpayer is a member of the Federal Home Loan Bank of Cincinnati.

4. The following are true and correct extracts from the rules and regulations for the Federal Savings and Loan System promulgated by the Federal Home Loan Bank Board:

> "Section 141.2 Federal Association—The term 'Federal association' means a Federal savings and loan association chartered by the board as provided in section 5 of the Home Owners' Loan Act of 1933, as amended.
>
> Section 141.3 Capital—The term 'capital' means the aggregate of the payments on savings accounts in a

Federal association, plus earnings credited thereto, less lawful deductions therefrom.

[fol. 180] Section 141.4 Savings Account—The term 'savings account' means the monetary interest of the holder thereof in the capital of a Federal association and consists of the withdrawal value of such interest.

Section 141.6 Withdrawal value—The term 'withdrawal value' means the amount paid on a savings account in a Federal association, plus earnings credited thereto, less lawful deductions therefrom.

Section 141.7 General reserves—The term 'general reserves' means the aggregate amount of reserves of a Federal association established by such association for the sole purpose of meeting losses. Any amount in a reserve for bad debts which is exclusively for bad debt losses, shall be deemed to be a part of the General Reserves and to be a part of the reserve for losses provided in the Charters of Federal associations which have a Charter E or a Charter K.

Section 141.8 Surplus—The term 'surplus' means the undistributed earnings of a Federal association which are held as unallocated reserves for general corporate use.

Section 145.6-12 Reserve for uncollected interest—A 'Reserve for Uncollected Interest' shall be maintained equivalent to all interest in default more than 90 days.

Section 145.17 Powers and duties—When designated for that purpose by the Secretary of the Treasury a Federal association shall perform all such reasonable duties as fiscal agent of the Government specified by the Secretary of the Treasury. Such a Federal association shall exercise only such powers and privileges as a fiscal agent of the Government as are enumerated in regulations prescribed by the Secretary of the Treasury. When the designation for that purpose by any other instrumentality of the United States has been [fol. 181] approved by the Board, a Federal association, upon qualification for such employment, shall perform the duties as agent of such instrumentality of the United States. Such a Federal association shall exercise only such powers and privileges as an agent

of any other instrumentality of the United States as are prescribed by such other instrumentality of the United States."

The following are true and correct extracts from the rules and regulations duly promulgated for the insurance of accounts under the National Housing Act as amended (Title 12 U. S. C., Section 1724 et seq.):

Section 163.11 Setting up, designation, and purpose of Federal Insurance reserve—Each insured institution shall set up a Federal insurance reserve account which shall be used solely for the purpose of absorbing losses. No insured institution may pay dividends from its Federal insurance reserve account. Any insured state-chartered institution may by resolution of its board of directors or by other appropriate corporate action designate as its Federal insurance reserve account any reserve account which under the provisions of state law is established for the sole purpose of absorbing losses. Evidence of such action shall be filed with the Corporation. With the prior written approval of the Corporation, any other reserve account which by specific and adequate corporate action of an insured institution is made subject to charges for losses only, may be designated as its Federal insurance reserve account. The general reserves of Federal savings and loan associations operating under Charter K or Charter N are deemed to meet the requirements of this section. Any amount in a reserve for bad debts, which is ex- [fol. 182] clusively for bad debt losses, shall be deemed to be a part of the Federal Insurance Reserve.

Section 163.12 Original credit to Federal Insurance reserve account—During the fiscal year in which a certificate of insurance is issued to an insured institution, it shall credit to its Federal insurance reserve account an amount at least equal to that fraction of three-tenths of one percent of all insurable accounts on the date of its latest financial statement or report in support of its application for insurance which the unexpired portion of its fiscal year from the date of such

certificate is to its full fiscal year, calculated to the nearest month.

Section 163.13 Regular credits—Each insured institution shall thereafter credit to its Federal insurance reserve, during each of its fiscal years, an amount equal to at least three-tenths of 1 percent of all insured accounts outstanding at the beginning of such fiscal year; and shall build up the Federal insurance reserve to an amount equal to at least 5 percent of all insured accounts within twenty years from such date: Provided, That credits to the Federal insurance reserve need not be made whenever such insurance reserve account equals or exceeds the minimum amounts required by this section. If for any reason, the Federal insurance reserve account of any institution which has been insured for at least twenty years is thereafter reduced to less than 5 percent of all insured accounts, such institution shall transfer to its Federal insurance reserve acount, for each dividend period at least 25 percent of its net operating income before the declaration of dividends or the payment of interest on savings, until its Federal insurance reserve account is again equal to at least 5 percent of all insured accounts.

[fol. 183] Section 163.14 Charging of losses and payment of dividends—No insured institution which has charged losses to its Federal insurance reserve account shall declare any dividends or pay any interest on savings unless the amount standing to the credit of such account, after deduction of all charges, is equal to at least the amounts required under Section 163.13: Provided, That, for any year dividends may be declared or interest on savings paid when losses are charged to such reserve, if the declaration of such dividends or the payment of such interest on savings is first approved by the Corporation: And provided further, That the Corporation hereby approves, for any such insured institution which has been insured for a period of twenty years or more and whose Federal insurance reserve account, prior to the charging of such losses, equalled at least 5 percent of all insured accounts, the declaration of dividends and the payment of interest on savings if such insured institution shall have first

transferred not less than 25 percent of its net operating income for the same dividend period to its Federal insurance reserve account."

5. The dates set by the Board of Tax Appeals under the provisions of General Code Section 5411-1 as of which the taxable deposits in financial institutions should be listed and assessed for the years involved herein are as follows:

Tax Year	
1947	November 7, 1946
1948	November 12, 1947
1949	November 4, 1948
1950	November 22, 1949
1951	November 14, 1950

[fol. 184] 6. The tax returns filed by the taxpayer and included in the transcript for the years involved herein are true and correct statements as to the items taken from the taxpayer's books of account. However, the taxpayer does not concede but contests the matters in issue herein including the conclusions in such returns relating to the amounts of taxable deposits, to the taxable value of shares or capital employed by the taxpayer, and the amount of taxes thereon.

7. The Tax Commissioner has assessed for the years and on or about the dates hereinafter set forth the taxpayer has paid the amount of financial institution taxes, set forth below to wit:

Tax Year	Date of Payment	Amount
1947	July 7, 1947	$11,488.37
1948	July 7, 1948	13,562.70
1949	July 6, 1949	15,842.98
1950	July 6, 1950	17,182.64
1951	July 10, 1951	19,376.70

8. Upon the dates hereinafter set forth, the amount of bonds of the United States with accrued interest thereon held by the taxpayer and included in its balance sheet and

the amount of Federal Home Loan Bank stock held by the taxpayer and included in its balance sheet were as follows:

Date	U. S. Bonds and Interest	Federal Home Loan Bank Stock
November 7, 1946	$2,127,818.70	$58,400.00
December 31, 1946	1,929,485.42	58,400.00
November 12, 1947	1,928,157.08	58,400.00
December 31, 1947	1,929,985.92	58,400.00
November 4, 1948	1,929,654.86	60,000.00
December 31, 1948	1,931,489.64	60,000.00
November 22, 1949	1,929,757.54	70,000.00
December 31, 1949	1,932,096.72	70,000.00
November 14, 1950	2,030,263.38	70,000.00
December 31, 1950	2,032,013.07	70,000.00

[fol. 185] 9. All of the returns referred to herein, the claims for refund and abatement, and notice of appeal were duly and regularly filed and the taxes were paid within the times required by law.

10. Upon the conversion of the Warren Savings and Loan Association into a federal savings and loan association in 1936, the total number of depositors or shareholders was 1677.

The number of savings share accounts of the taxpayer at the beginning, the number of new accounts opened and the number of accounts closed, in each of the years involved herein were and are as follows:

Year	Number at Beginning	New Accounts	Accounts Closed
1947	4958	1772	1038
1948	5692	2094	1159
1949	6627	1732	1287
1950	7072	3487	2756
1951	8479	3475	2799

First Federal Savings and Loan Association of Warren, Appellant, By Robert G. Day, Its Attorney. John W. Peck, Tax Commissioner, Appellee, By C. William O'Neill, Attorney General, Joseph S. Gill, First Assistant Attorney General.

[fol. 186] BEFORE THE BOARD OF TAX APPEALS

TRANSCRIPT OF PROCEEDINGS

Examiner Ford: Before the Board of Tax Appeals, Department of Taxation of Ohio. First Federal Savings and Loan Association of Warren, Warren, Ohio, appellant, against John W. Peck, Tax Commissioner of Ohio, appellee. Case Number 22533. Appeal filed herein under date of August 27, 1952, from a final order of the Tax Commissioner under date of July 30, 1952, denying application or applications for a certificate or certificates of abatement theretofore filed by the appellant for and on account of alleged overpayment of intangible taxes assessed against the appellant as a financial institution for the years 1947 to 1951, inclusive, which alleged overpayments arose, it is stated, by the inclusion in the taxable resources and in the tax basis of bonds and securities owned by the United States government and owned by the appellant, and stock in federal instrumentalities owned by the appellant with respect to such tax years.

Case heard before William J. Ford, attorney examiner for the Board of Tax Appeals, at Columbus, Ohio, at the hearing room of the board, on November 19, 1952, pursuant to assignment.

Counsel for the appellant and counsel for the appellee will enter their appearances by name and office address.

Mr. Day: Robert G. Day, Second National Building, Warren, Ohio, attorney for the appellant.

Mr. Gill: C. William O'Neill, by Joseph S. Gill, for the Tax Commissioner.

Examiner Ford: The board desires a statement of the case with respect to the issues involved therein. Mr. Day, will you proceed?

[fol. 187] Mr. Day: First, may we have a stipulation that the year 1952 is not in issue? I am asking that for the reason that the claim for refund or abatement which was filed before the payment of the 1952 tax and although it made a claim for abatement of that tax, that was ignored by the Tax Commissioner, I assume, by reason of the fact that it was prematurely filed.

Mr. Gill: I will so stipulate, Mr. Day, and there will be no attempt to bind the year 1952 in this proceeding.

Examiner Ford: Well, at any rate, without the stipulation, the only thing before the board is the matters of certificates for abatement on any alleged overpayment for the years 1947 to 1951, inclusive. That is all that is before the board.

Mr. Day: Briefly, the situation involved herein is as follows: The First Federal Savings and Loan Association is a federal savings and loan association, organized and existing under the Federal Home Loan Act of 1933 as amended. It was converted from a former state association, state building and loan association organized under the laws of Ohio in 1922. The method of operation of the taxpayer is approximately or substantially as follows: It receives sums on deposit which under its charter are called shares. They are credited in the deposit column and in the balance column of the pass books which are issued to each depositor. Twice a year each account, at least each account over $5 is credited with a dividend, so-called, just as interest is paid upon deposits in banks and that is added to the balance. Normally at any time, any part or all of the balance to the credit of any account may be withdrawn by the depositor or shareholder, so-called.

[fol. 188] The taxpayer has no accounts which are not withdrawable. That is, it has no shares which are not withdrawable and it has no other accounts except that at the outset, or I think in each of the years involved, there were some due borrowers' accounts which were simply the credit to borrowers when a loan is granted and until it has been entirely paid out. The borrower is credited with the amount of the loan granted less the amounts which are paid out.

This association, the taxpayer, has filed its—under the rules and regulations applicable to it, it sets up a federal insurance reserve which is a reserve for losses which are required under the federal savings and loan insurance which is provided for under the Federal Housing Act, I believe. All federal savings and loan associations are required to have their accounts insured. Then there is a contingency reserve which is likewise set up under the law, under the Federal Home Loan Act, and regulations thereunder in a certain percentage each half year.

The depositors are entitled to withdraw, as I said, any part or all of the amounts to their credit at any time, but

no one has any right to withdraw any part of all of the reserves or the undivided profits.

Now, on the dates required by law, the taxpayer filed its returns and they were duly filed and in those returns, on the forms provided by the Tax Commissioner, the amounts set forth were taken from the books of the association. Recently, following a decision of the Supreme Court of Ohio in the case of Wren Paper Company against Glander, it appeared that the court had held that it was improper to include in the tax base in that situation, which, by the way, was very similar to the tax base in the case at bar—very improper to include any federally owed securities. Con- [fol. 189] sequently, in behalf of this association, the taxpayer in the case at bar, we filed claims for refund based upon the reduction of the tax base in each year by the amount of federal bonds, United States bonds, and interest thereon accrued, owned by the taxpayer plus the Federal Home Loan Bank stock which it owned at that time.

These claims for refund or abatement were denied by the taxpayer——

Examiner Ford: You mean the Tax Commissioner.

Mr. Day: Tax Commissioner, pardon me, and an appeal was taken by the taxpayer.

In the stipulation which has been agreed upon covering most of the facts, we will show the turnover in the number of these accounts from year to year during the years involved herein. I think that will give you a general idea of the facts in the case at bar.

Examiner Ford: Let me ask you, Mr. Day, did this appellant before the Tax Commissioner make the claim and does it now make the claim before the board that it is entitled to certificates of abatement based upon the amount of the alleged overpayments during the years 1947 to 1951, inclusive, against the whole amount of the tax assessed against the appellant as a financial institution for said tax years, or does it claim a certificate of abatement only against the tax that was assessed not on the deposits, but on the capital employed by the company during said tax years?

Mr. Day: The claim, Your Honor, was against both items of the tax assessed, the deposits and the surplus or reserves and undivided profits. I assume that there may be two separate questions as to those two divisions of the tax.

Examiner Ford: Do you have any statement to make, Mr. Gill?

[fol. 190] Mr. Gill: It is the contention of the Tax Commissioner, Mr. Ford, that two things: One, that the Wren Paper case is not a precedent for this case and does not determine the issues here involved.

Two, that from the facts as set out in the stipulation and from Mr. Day's opening statement, this is a truly mutual concern, that it has no capital involved as such, that the only things involved are depositors' interest. The only thing that was taxed was depositors' interest in this institution. Therefore, there is not involved any constitutional question of taxation of capital because there is no capital in the institution.

Examiner Ford: You may proceed with your evidence.

Mr. Day: We have a stipulation of facts agreed to in behalf of both parties which I should like to file. Is it your practice to have these read into the record?

Examiner Ford: Read in the record. Both, that is, they will both be filed and read into the record.

Mr. Gill: There are some rules in there, Mr. Ford, that are pretty verbose. Could we agree to have the reporter copy that in the record? I don't think either Mr. Day or I particularly want to read those rules in.

Examiner Ford: Off the record.

(Discussion off the record.)

Examiner Ford: The stipulation of fact, signed by counsel for the parties herein is received and filed as of this day and the same, by agreement of counsel, is read into the record of this case as follows:

[Stipulation of facts omitted here in printing. See pp. 7-14, supra.]

Mr. Day: With Mr. Gill's consent, I should like to read in the record one paragraph of the regulations governing [fol. 191] agencies for the issuance of defense savings bonds, issued by the Treasury Department, April 15, 1941, the second paragraph only.

Mr. Gill: That is all right, Mr. Day. I object to its relevancy. I have no objection to the fact that he is reading from a printed copy, Mr. Ford.

Examiner Ford: You had better have it marked as an exhibit and have it passed on.

Mr. Day: We will mark this as an exhibit.

(Appellant's Exhibit 1 was marked for identification.)

Examiner Ford: Who is going to identify this? Is your witness going to identify it or will you identify it professionally?

Mr. Gill: Let the record show that I waive objection to the identification of the Appellant's Exhibit 1, but I object to its admission on the ground of its relevancy to the issue involved. I believe it is tendered for the purpose of showing that the appellant organization was a federal instrumentality during the period involved in a manner not relevant to the tax issue here before the board.

Examiner Ford: Let me take a look at that.

What do you claim for the second paragraph of Appellant's Exhibit 1 as evidence in this case?

Mr. Day: That is a designation of the taxpayer as a fiscal agent and then I have two succeeding instruments that follow that—that follow along with that, a specific trust agreement and a certification of qualification under that designation.

In other words, that is a general designation and these next two exhibits which I am about to offer will make it specific as to this taxpayer; showing qualifications as an [fol. 192] instrument of the government under that general designation.

Examiner Ford: Speaking for myself as examiner in this case, I don't see the materiality but members of the board may have a different notion about it. I feel that under the circumstances, in order that the board itself may have the picture before it that I will receive this particular evidence subject to the objection of counsel for the appellee and subject to the reservation hereby made that the competency, materiality and relevancy of this paragraph 2 of Appellant's Exhibit 1 be reserved for the consideration of the board upon the objection made by counsel for the appellee.

(Appellant's Exhibit No. 1 was received in evidence.)

Examiner Ford: It is so ordered, and the exception of counsel for the appellee is noted.

I understand you are not making any objection with respect to the identification of Appellant's Exhibit 1.

Mr. Gill: That is correct. It may be admitted as if it were properly identified.

Mr. Reporter, will you please note a request to the board that they rule on this piece of evidence in their entry in this case?

Examiner Ford: In so far as he is permitted to do so, the examiner orders and directs that this motion be hereby sustained.

Mr. Day: Please mark these in order.

(Appellant's Exhibits Nos. 2 and 3 were marked for identification.)

Mr. Day: We offer in evidence and ask leave to substitute copies of Appellant's Exhibit 2 which is an application and trust agreement on Treasury Department Form 3805 [fol. 193] following up the general designation in Appellant's Exhibit 1.

Likewise, Appellant's Exhibit No. 3 which is a certification by the Federal Reserve Bank of Cleveland, as fiscal agent of the United States, qualifications of First Federal Savings and Loan Association of Warren as an issuing agent for sale of United States defense bonds on Form No. 385-A, and we ask leave to substitute copies of each of them for the original in the record.

Mr. Gill: Your Honor, the appellee waives any objection as to identification or substitution of copies of these two proffered documents, but objects to them on the same grounds to which he objected to Exhibit No. 1.

Examiner Ford: The examiner has the same views with respect to Appellant's Exhibits 2 and 3 as he has with respect to paragraph 2 of Appellant's Exhibit 1. However, the ruling of the examiner will be the same as far as this hearing is concerned. The objection of counsel for the appellee to introduction of Appellant's Exhibits 2 and is overruled and said exhibits are received subject to the objection of counsel for the appellee to the exhibits on the ground as stated by him, that the same are not material or relevant to the issues in this case and the question of

materiality and relevancy so made [illegible] the objection of counsel for the appellee will be and hereby is reserved for the consideration of the board and the determination of the case on its merits.

(Appellant's Exhibits Nos. 2 and 3 were received.)

Examiner Ford: Note the exception of counsel for the appellee.

Mr. Gill: Motion that the board make a ruling on the admissibility of these offered exhibits in its entry in this case. [fol. 194] Examiner Ford: So far as the examiner is authorized to do so, the examiner sustains this motion.

Mr. Day: Please mark this.

(Appellant's Exhibit No. 4 was marked for identification.)

Mr. Day: I would like to offer in evidence the Appellant's Exhibit No. 4 which is a photostatic copy of the charter and amendments and the rules and regulations of the taxpayer certified by J. W. Whitaker, supervisory agent of the Home Loan Bank board.

Examiner Ford: As I understand it, Mr. Gill, speaking with respect to Appellant's Exhibits 2 and 3, you are making no question as to the identification of these documents?

Mr. Gill: No, sir, or the substitution of copies.

May I take a look at this? I think this may go in without objection.

This last offered exhibit may go in without objection, Mr. Ford.

Mr. Day: Please mark these in order.

(Appellant's Exhibits Nos. 5 through 9 were marked.)

Mr. Day: I now offer in evidence Appellant's Exhibits 5, 6, 7, 8, and 9.

I offer No. 4 in evidence.

Examiner Ford: It has not been ruled on yet.

Mr. Day: I beg your pardon.

Examiner Ford: Appellant's Exhibit 4, having been offered in evidence by counsel for the appellant—do you have any objection to the introduction of this exhibit, Mr. Gill?

Mr. Gill: I have no objection, Mr. Ford.

Examiner Ford: Appellant's Exhibit No. 4, offered in evidence, and without objection, the same is received.

[fol. 195] (Appellant's Exhibit No. 4 was received.)

Mr. Day: We now offer in evidence Appellant's Exhibits Nos. 5, 6, 7, 8, and 9, the tax bills covering the tax in question herein as rendered by the office of the treasurer of the state for the years 1947 through 1951, inclusive, and request leave to substitute copies.

(Discussion off the record.)

Examiner Ford: Do you have any objection?

Mr. Gill: No, just that it is a duplication. If you want to receive them, it is all right with me.

Examiner Ford: Appellant's Exhibits 5 to 9, inclusive, having been offered in evidence and counsel for appellee having stated that he has no objection to the introduction of said exhibits, the same are received and made a part of the record in this case.

(Appellant's Exhibits 5 through 9 were received.)

Mr. Day: I would like to have Mr. William C. Burkhart, assistant treasurer of the taxpayer, sworn for a very few questions.

William C. Burkhart, being first duly sworn, testified as follows:

Direct examination.

By Mr. Day:

Q. Face the attorney examiner when you answer. Will you state your name and address?

A. William C. Burkhart, 696 Meadowbrook, Southeast, Warren, Ohio.

Q. That is B-u-r-k-h-a-r-t, is it?

A. Yes.

Q. What is your occupation?

A. Assistant treasurer of the First Federal Savings and Loan Association of Warren, Ohio.

Q. How long have you been employed by the appellant in this case?

A. Since May 8, 1946.

[fol. 196] Q. And in what capacity have you been so employed?

A. Main capacity chief accountant in charge of their records.

Q. Will you state whether or not the association, the taxpayer, is still acting as fiscal agency for the government under these designations which have been introduced as Appellant's Exhibits 1, 2, and 3?

Mr. Gill: Objection.

Examiner Ford: In line with my former ruling as to Exhibits 1, and 2, and 3, the objection of counsel for appellee is overruled so far as this hearing is concerned and the objection of counsel for the appellee is reserved for the ruling of the board as to its materiality and relevancy on the determination of the merits of the case.

Mr. Gill: Yes, I will ask that the question be ruled upon. There is an objection to the form of that question, Mr. Ford. Why doesn't he just ask if they still sell war bonds under a designation?

Mr. Day: If there is an objection to the form of the question——

Examiner Ford: Wait a minute. You mean it embodies a conclusion?

Mr. Gill: It certainly does. He asked if they are still operating as a fiscal agency of the federal government.

Examiner Ford: Well, it might be objectionable on that ground alone, of course. If you insist on it, the objection will be sustained in that form. You may present another question.

By Mr. Day:

Q. What is the fact as to whether or not the taxpayer, the First Federal Savings and Loan Association of Warren is still selling war bonds, redeeming war bonds and acting [fol. 197] as consignee of war bonds under these designations, Appellant's Exhibits 1, 2, and 3?

Mr. Gill: I object to that on the ground of relevancy, Mr. Ford.

Examiner Ford: The objection of counsel for the appellee is overruled so far as this present hearing is concerned and the question presented by the objection of counsel for the appellee is reserved for the determination of the board upon the consideration of the merits of the case.

Mr. Gill: Motion for a ruling.

Examiner Ford: In so far as it is proper for the examiner to do so, it is hereby ordered and directed that the board make a specific ruling on this question presented by the objection of counsel for the appellee.

By Mr. Day:

Q. What is the fact as to whether the book and accounts of the taxpayer are audited periodically or not?

Examiner Ford: Let's see, what is the answer to the last question?

The Reporter: It was not answered.

Mr. Day: Withdraw the last question.

The Witness: In reply to the question, they are still selling defense savings bonds and cashing them as well.

By Mr. Day:

Q. And does the taxpayer still act as consignee holding bonds for sale?

A. Yes.

Examiner Ford: What do you mean by that?

The Witness: The Federal Reserve Bank of Cleveland sends us bonds on consignment which we hold and sell, making a monthly report and return to them for the bonds sold during that period.

[fol. 198] By Mr. Day:

Q. Now, the question following: What is the fact as to whether or not the books and accounts of the taxpayer are periodically audited by some outside agency?

A. Our books and accounts are examined and audited by the Home Loan Bank board federal examiners periodically, usually once a year, sometimes they run over maybe 18 to 22 months before they return for an examination.

Q. But when they do, do they take up at the point of the

termination of the last examination, or is there some break in the period there?

A. They take up from the date of the last examination.

Q. By whom were these tax returns of financial institutions prepared for First Federal Savings and Loan Association for the years 1947 through 1951, both inclusive?

A. I prepared those returns.

Mr. Day: You may cross examine.

Mr. Gill: I have no questions, sir.

(Witness excused.)

Mr. Day: I would like to make sure of this. Is the complete transcript from the Tax Commissioner considered a part of the evidence?

Examiner Ford: Those transcripts are a part of the record now. The law requires them to be filed by the Tax Commissioner with the Board of Tax Appeals. That law has been complied with and the transcripts are now a part of the record.

Mr. Day: We rest our case.

Mr. Gill: I have no evidence, Mr. Ford.

Examiner Ford: The appellant having rested, the appellee having rested, and there being no rebuttal evidence, the case is submitted.

[fols. 199-203] The case is submitted upon the appeal, submitted upon the transcript of the proceeding of the Tax Commissioner relating to the assessments made against the appellant as a financial institution for the years 1947 to 1951, inclusive; upon the transcript of the proceedings of the Tax Commissioner; upon the application for certificate or certificates of abatement; on the evidence adduced at the hearing of this case this day and upon briefs to be filed by counsel within such times as the rules of the board provide.

(Case submitted at 2 o'clock p. m.)

[Printing of all exhibits dispensed with by order of court.]

[fols. 204-213] BEFORE THE BOARD OF TAX APPEALS

APPELLANT'S EXHIBIT 4

Charter

Exhibit K

Pursuant to the provisions of Section 5 of the Home Owners' Loan Act of 1933, the Federal Home Loan Bank Board hereby issues the following charter:

1. Name. —The name of the Federal savings and loan association hereby chartered (hereinafter referred to as the "association") is "First Federal Savings and Loan Association of Warren".

• • •

All share accounts shall be nonassessable, and no holder thereof shall be responsible for any losses incurred by the association beyond the loss of the participation value of his share accounts at the time the loss is determined.

[fol. 214] [Stamp:] Paid July 7, 1947. Don H. Ebright, Treasurer, of State, Columbus, Ohio.

BEFORE THE BOARD OF TAX APPEALS

APPELLANT'S EXHIBIT 5

State of Ohio, Office of the Treasurer of State, Columbus, Ohio

No. 868

1947 Tax Bill for Personal Property of Financial Institutions

This bill is rendered in accordance with the provisions contained in Amended S. B. 30, and conforms with the Assessment Certificate previously rendered by The Department of Taxation.

Name: First Federal Savings & Loan Assn. of Warren.
175 E. Market St., Waren, Ohio.
Tax $11,488.36.

Notice

To avoid Penality, Please Remit on or Before July 20, 1947.

If Receipt is desired, enclose stamped self-addresed envelope and return this Statement and Stub with Remittance.

For Detail Please refer to assessment certificate.

Form No. 108, Don H. Ebright, Treasurer of State.

[fol. 215] Clerk's Certificate to foregoing transcript omitted in printing.

[fols. 216-217] IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1954

No. 220

[Title omitted]

STATEMENT OF POINTS TO BE RELIED UPON—Filed July 24, 1954

Appellant adopts for its statement of points upon which it intends to rely in its appeal to this court, the points contained in its Assignment of Errors heretofore filed to the same extent as though fully repeated herein.

Copy of this Statement has been mailed to counsel for appellee this 22nd day of July, 1954.

Robert G. Day, Attorney for Appellant, Hoppe, Day & Ford, Second National Building, Warren, Ohio. Of counsel.

[fol. 218] [File endorsement omitted.]

[fol. 219] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1954

No. 220

FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF WARREN, Appellant,

vs.

STANLEY J. BOWERS (Successor to John W. Peck), Tax Commissioner of Ohio

Appeal from the Supreme Court of the State of Ohio

ORDER NOTING PROBABLE JURISDICTION—October 14, 1954

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is transferred to the summary calendar. The Solicitor General is invited to file a brief as *amicus curiae*.

Mr. Justice Burton took no part in the consideration or decision of this question.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 204

SOCIETY FOR SAVINGS IN THE CITY OF CLEVELAND,

Appellant,

vs.

JOHN W. PECK, TAX COMMISSIONER OF OHIO

ON APPEAL FROM THE SUPREME COURT OF OHIO

STATEMENT AS TO JURISDICTION

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EDGAR P. STOCKER,
Counsel for Appellant.

THOMPSON, HINE & FLORY,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 204

SOCIETY FOR SAVINGS IN THE CITY OF CLEVELAND,

Appellant,

vs.

JOHN W. PECK, TAX COMMISSIONER OF OHIO

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, Society for Savings in the City of Cleveland submits the following statement for the purpose of disclosing the basis upon which the Supreme Court of the United States has jurisdiction, to review, on appeal, the judgment of the Supreme Court of Ohio, entered in this case.

I. Nature of the Case and Questions Involved

This case involves the constitutionality of Ohio statutes, which the Supreme Court of Ohio has so construed as to permit the State of Ohio to tax a mutual savings bank upon its surplus and reserves, without deduction of the United States obligations owned by the bank.

The bank has no capital stock and no shares or shareholders. The tax is (1) levied against the bank; (2) measured by the net book assets of the bank, including all United States obligations owned by it; (3) paid by the bank; and (4) the bank has no right to reimburse itself for the tax paid by collecting prorata portions of the same from depositors.

The Tax Commissioner of Ohio asserts a novel theory that this tax was on some "intangible property right" of the depositors, additional to their deposits themselves (which are separately taxed). He contends that the bank is reimbursed for the tax, because the payment of the tax by the bank diminishes its assets, and that the economic effect upon the depositors is the same as if the bank had recouped the amount of the tax by collection from the depositors.

Society for Savings in the City of Cleveland (hereafter called Appellant) contends that these statutes, as so construed, are repugnant to Article I, Sec. 8, Cl. 2, of the Constitution of the United States;[1] to Sec. 3701 of the Revised Statutes of the United States (31 USCA § 742);[2] and to the supremacy clause of the Constitution, Article VI, paragraph 2;[3] or, in an alternative, to Amendment XIV of the Constitution. The questions are stated at greater length in the Assignments of Error.

---

[1] "The Congress shall have power * * * to borrow Money on the credit of the United States."

[2] "Except as otherwise provided by law, all stocks, bonds, Treasury notes, and other obligations of the United States shall be exempt from taxation by or under state or municipal or local authority."

[3] "This Constitution and the Laws of the United States which shall be made in Pursuance thereof * * * shall be the supreme law of the land."

II. Statutory Provision Sustaining the Jurisdiction

The jurisdiction of the United States Supreme Court to review on appeal the judgment appealed from is sustained by Title 28, U. S. Code, Sec. 1257(2).

III. State Statutes, the Validity of Which Is Involved

The Ohio statutes imposing the tax are set forth in full in the Journal Entry of the Ohio Board of Tax Appeals, Appendix B to this Statement. The language important in this appeal is as follows:

> "*Ohio General Code, § 5408 (taxable property of financial institutions, how listed, assessed and taxed)* * * * the capital employed, or the property representing it, in a financial institution the capital of which is not divided into shares, or which has no capital stock, located in this state, shall be listed and assessed at the book value thereof, and taxed in the manner provided in this chapter."
>
> "Ohio General Code, § 5412. Upon receiving such report the Tax Commissioner shall ascertain and assess * * * the value of the property representing the capital employed by such financial institution, not divided into shares, at the aggregate amount of the capital, the surplus or reserve fund and the undivided profits as shown in such report. * * *"

IV. Summary of Facts and Proceedings

Society for Savings in the City of Cleveland is a mutual savings bank incorporated under the laws of the State of Ohio. It has no capital stock; it has only surplus and undivided profits which are held for protection against possible decline in value of its assets, and are equivalent to net worth.

The State of Ohio, acting under the statutes quoted above, assessed against the bank, taxes based upon its "sur-

plus or reserve fund and undivided profits", and in so doing included the value of all of the United States obligations, owned by the bank. Such taxes for the years 1947 to 1951 inclusive, here in question, totaled $126,115.96. All of these taxes resulted from the inclusion of United States obligations, in the assets of the bank, because the value of United States obligations owned by the bank exceeded the bank's surplus and reserves, for each of the years in question.

The bank has also paid a tax based upon the amount of its deposits. Under Ohio law, this tax is levied against the property right of the depositors measured by the amount of their deposits, and the bank is authorized to reimburse itself for the amount so paid by a charge to the depositors' accounts. There is no issue in this case about this tax on deposits.

The unconstitutionality of the Ohio statutes, in taxing the bank without deduction for its United States bonds, has been the issue in this litigation from its inception. The Application for Abatement, to the Tax Commissioner (R. 3) and the Notice of Appeal to the Board of Tax Appeals (R. 7) were based on this contention. The Tax Commissioner denied the Application. The Board of Tax Appeals reversed, on the federal constitutional and statutory grounds here raised (see Appendix B). The Tax Commissioner appealed to the Supreme Court of Ohio which, on March 10, 1954, reversed the Board of Tax Appeals and held that the Ohio statute and the tax were not repugnant to either the Constitution or the Statute of the United States (Opinion, 161 O. S. 122, 118 N. E. 2d 651, and Appendix A attached hereto). Application for rehearing was timely filed and was denied March 31, 1954. Petition for appeal was presented to the Supreme Court of Ohio on the 3rd day of June, 1954.

V. The Federal Question Is Substantial

The Ohio tax is admittedly an *ad valorem* property tax. It is levied against the banking corporation, measured by its surplus, reserves and undivided profits, including the value of its federal bonds.

The decision of the Ohio Supreme Court, holding the tax constitutional, conflicts directly with a long line of decisions of the United States Supreme Court. In *Weston* v. *City Council*, 2 Pet. 449, Chief Justice Marshall said:

> "Can anything be more dangerous or more injurious, than the admission of a principle which authorizes every state * * * to burden the exercise of this power (to borrow money on the credit of the United States) at their discretion."

States have made a series of attempts to tax banks and insurance companies on the value of their capital and surplus, without excluding from their assets, their federal bonds. The United States Supreme Court has held that this device of taxing net worth is equivalent to taxing the federal bonds, and is unconstitutional. *Bank of Commerce* v. *New York City*, 2 Black 620 (1863); *Bank Tax Case*, 2 Wall. 200 (1864); *Home Savings Bank* v. *Des Moines*, 205 U. S. 503 (1907); *Farmer's Bank* v. *Minnesota*, 232 U. S. 516 (1914); *Missouri Insurance Company* v. *Gehner*, 281 U. S. 313 (1930); *New Jersey Title Insurance Company* v. *Division of Tax Appeals*, 338 U. S. 665 (1950).

In those cases, as in the instant one, taxes were levied upon banks or insurance companies and borne by them. Such taxes are distinguished from taxes on shares of stock, owned by shareholders, where the tax is borne by the shareholder; shares of stock are property, held to be, in themselves, property taxable to the owner of the shares. The bank may be made the collector of the tax, if it is given a

right of reimbursement against the shareholder, who bears the tax.

The distinction was made clear in *Home Savings Bank* v. *Des Moines*, 205 U. S. 503, where a bank had been compelled to pay a tax on the value of its capital shares, without deduction of the United States bonds owned; it was not given a right of reimbursement from the shareholders. The tax was held invalid.

> "The law imposes no obligation on the shareholder. In paying the tax the corporation has paid its own debt and not that of others, and there is nothing in such a payment from which the law can imply a promise of reimbursement. These taxes, therefore, are not to be paid by the banks as agents of their stockholders, but as their own debt, and unless it is supposed that the law requires them to pay taxes upon property which they do not own, the taxes must be regarded as taxes upon the property of the banks." (Opinion 511.)

In the instant case, it is not claimed by the Tax Commissioner of Ohio nor asserted by the Ohio Supreme Court that there is any right in the bank to recoup the tax from anyone; the State does claim, first, that the depositors have an "intangible property interest" in the surplus and, second, that the bank can be compelled to pay the tax assessed against such "intangible property interest" without any right to recoup the amount so paid from the depositor, who is said to own it.

This claimed "intangible property interest" of the depositor is a novel theory. It is not his deposit; "deposit" is defined by Sec. 5324 of the Ohio General Code as that which the depositor is "entitled to withdraw in money". This is separately taxed against the depositor.

Beyond his deposit, the depositor has no interest that is measurable, or capable of valuation, or transferable, or separable from the deposit. The surplus is a protection to

his deposit, against losses by the bank; when he withdraws his deposit, he no longer has even this benefit. The Record (p. 14) shows that about 20,000 persons each year cease to be depositors, and more than that number become new depositors.

Where a federal right is concerned, the Supreme Court of the United States is not bound by the name given to a state tax by state courts or legislatures; that court alone determines the real nature of the tax and its effect upon the federal right. *United States* v. *County of Allegheny* 322 U. S. 174; *Carpenter* v. *Shaw*, 280 U. S. 363. As stated in *Senior* v. *Braden*, 295 U. S. 422 at page 429:

> "The validity of the tax under the Federal Constitution is challenged. Accordingly we must ascertain for ourselves upon what it was laid. Our concern is with realities, not nomenclature."

Wisconsin v. *J. C. Penney Company*, 311 U. S. 435, at page 443:

> ". . . The descriptive pigeon hole into which a state court puts a tax is of no moment in determining the constitutional significance of the exaction."

Even if the surplus of the bank were owned jointly by all the depositors, such ownership is very different from a separate property, such as stock, which can be taxed. If we did have a joint ownership of the surplus, including the United States bonds, the joint-owners could no more be taxed on their United States bonds than could the bank itself. The inherent vice of taxing the bonds is the same.

As was said in the dissenting opinion below (p. 146):

> "The same inhibition against assessing the tax exists, where such capital employed or the property representing it is owned by any person or group of persons whether known or unascertainable. * * * The vice in the tax assessment is in taxing property which

> includes federal securities, without the deduction of such securities."

It is also true that even if the depositor had a property right in the surplus of the bank, such as could be taxed against him, the bank could not be compelled to pay his tax, without the right to collect it back from him.

To compel one person to pay the taxes on the property of another, without right of reimbursement, is a deprivation of property without due process of law, and would violate the Fourteenth Amendment. This point was also raised in the State Court, but would become important only if the United States Supreme Court should find that the tax is on property of the depositors; it therefore is not amplified here.

In its effort to argue that the tax is on the depositors and not upon the bank, the State of Ohio attempts to meet the requirement, established by the United States Supreme Court, that a tax paid by a bank cannot be held to be a tax against a third person unless the bank has the right to recoup the tax so paid, from the person for whom it has paid it. The Ohio Supreme Court, in the majority opinion (p. 137) argues that the corporation is "reimbursed" because the value of its surplus has been reduced.

> "Such payment (of the tax) will necessarily reduce the amount which the corporation will have available for payment of interest to depositors * * * and which will be available for protection of their deposits * * * and for distribution to them in the event of liquidation of the corporation."

But this is not reimbursement or recoupment of the tax paid. The tax is paid by the bank; it gets nothing back; its net worth is permanently diminished.

The same argument would be applicable to a tax based on value of capital shares against a bank having capital shares. The argument was attempted, and rejected by the

United States Supreme Court, in *Home Savings Bank* v. *Des Moines*, 205 U. S. 503:

(P. 511)

"It is said that where a tax is levied upon a corporation measured by the value of the shares in it, it is equivalent in its effect to a tax (clearly valid) upon the shareholders in respect of their shares, because, being paid by the bank, the burden falls eventually upon the shareholders in proportion to their holdings; * * * but the two kinds of taxes are not equivalent in law, because the State has the power to levy one and had not the power to levy the other."

(P. 520)

"Moreover, it may be said that, if given the effect claimed, the consideration that the ultimate burden of the tax is distributed upon the shareholders in proportion to their holdings, would have saved the taxes condemned in the *Bank of Commerce case* and the *Bank Tax case*, and indeed all taxes assessed upon the property of corporations, and the immunity from state tax of United States bonds owned by corporations would indirectly be absolutely destroyed."

The question decided in *Farmer's Bank* v. *Minnesota*, 232 U. S. 516, was substantially the same as the issue in the instant case. The bank was a mutual savings bank, having no shares; the tax, likewise, was to be paid by the bank and was on the value of the surplus and undivided profits; there was no right of reimbursement from depositors.

The Court held unanimously, page 528:

"But if the surplus is treated as property and taxed as such, it is obvious that some portion of the burden of the tax is attributable to the ownership of the municipal (in federal territory) bonds. * * * It results that the inclusion of the bonds now in question in the list of the assets of plaintiff in error, in ascertaining its surplus for the purpose of imposing a state property

tax thereon, was repugnant to the Constitution of the United States."

The federal question is substantial not only in principle, in its effect upon the financing of the United States, but also in the large amount of United States bonds affected. Appellant itself owned more than $100,000,000 of United States obligations; other mutual savings banks in Ohio own additional amounts. What is more important is the fact that if this decision of the Ohio Supreme Court is allowed to stand unreversed, so that this bank is required to pay the tax, without deduction of the value of its federal obligations, the device will almost certainly be seized upon by many other states.

The long history of cases in the United States Supreme Court has shown the eagerness of the states to find some device to tax the value of United States bonds, in banks. There are 573 mutual savings banks in the United States; their total holdings of United States obligations are more than $9,100,000,000.

We submit that the basic reason, underlying the constitutional prohibition, is applicable to this tax; *Missouri* v. *Gehner, supra,* 281 U. S. at page 321:

> "As the tax-exempt feature tends to increase and is reflected in the market prices of such securities, a state tax burden thereon would adversely affect the terms upon which money may be borrowed to execute the purposes of the general government * * * Neither ingenuity and calculation nor form of words in state enactments can deprive the owner, of the tax exemption established for the benefit of the United States."

The statement in *New Jersey Insurance Company* v. *Division of Tax Appeals,* 338 U. S. 665 at page 675, is applicable here:

> "The result which is thus indicated is also required by the legislative purpose, which we have found in

§ 3701, 'to prevent taxes which diminish in the slightest degree the market value or the investment attractiveness of obligations issued by the United States in an effort to secure necessary credit.' *Smith* v. *Davis*, 323 U. S. 111, 117 (1944)."

Conclusion

It is, therefore, respectfully submitted that this Court has jurisdiction of this appeal under Title 28, U. S. Code, Sec. 1257(2).

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Dated: June 3, 1954 .

APPENDIX A

OPINION OF THE SUPREME COURT OF OHIO
together with

DISSENTING OPINION OF STEWART, *J.*

Reported in 161 O. S. 122, 118 N. E. 2d 651

Decided March 10, 1954

IN THE SUPREME COURT OF OHIO

No. 33,523

SOCIETY FOR SAVINGS IN THE CITY OF CLEVELAND, *Appellee*

vs.

JOHN W. PECK, Tax Commissioner of Ohio, *Appellant*

TAFT, *J.:*

The question to be decided is whether, in ascertaining and assessing "the value of the property representing the capital employed by [an incorporated] financial institution, not divided into shares," pursuant to Section 5412, General Code, the Tax Commissioner must eliminate federal securities owned by such institution in computing "the aggregate amount of the capital, the surplus or reserve fund and the undivided profits" of such institution.

It should be observed that the word "capital," when used with reference to a corporation, may be used to describe at least three different things. For example, it may be used (1) to describe all the property or assets of the corporation (see *National Bank* v. *Commonwealth*, 76 U. S. [9 Wall.] 353, 19 L. Ed. 701, 702), (2) to describe a bookkeeping figure representing a part or all of the net worth of the corporation (*Missouri, ex rel. Missouri Ins. Co.* v. *Gehner, Assessor*, 281 U. S. 313, 74 L. Ed. 870, 50 S. Ct. 326), and (3) to describe part or all of the property interest in the corporation which belongs to its shareholders or other owners.

The difference between the first and third of the above-mentioned uses of that word is well demonstrated in the opinion by Mr. Justice Miller in *National Bank* v. *Commonwealth, supra*, where is it said:

"* * * it has been established as the law governing this court that the *property or interest of a stockholder in an incorporated bank, commonly called a share*, the *shares in their aggregate totality being called sometimes the capital stock* of the bank, *is* a *different* thing *from* the monied *capital of the bank* held and owned by the corporation. This capital may consist of cash, or of bills and notes discounted, or of real estate combined with these. The whole of it may be invested in bonds of the government, or in bonds of the state, or in bonds and mortgages. In whatever it may be invested it is owned by the bank as a corporate entity, and not by the stockholders. A tax upon this capital is a tax upon the bank, and we have held that when that capital was invested in the securities of the government it could not be taxed, nor could the corporation be taxed as the owner of such securities.

"On the other hand, we have held that the shareholders, or stockholders, by which is meant the same thing, may be taxed by the states on stock or shares so held by them, although all the capital of the bank be invested in federal securities * * *." (Emphasis added.)

Considerable care must therefore be used in determining what the word "capital" means in each instance in which it is used in the statutes here involved.

Before analyzing the statutes involved, it will also be helpful to state several basic propositions of law which seem to be well settled.

1. A state cannot levy a property tax on federal securities.

2. A state cannot levy a p operty tax against a corporation *on its* capital or *on its* net worth without excluding federal securities in the computation of *such* capital or net worth. In the absence of such an exclusion, such a tax is regarded in effect as being a tax on the federal securities. *Missouri, ex rel. Missouri Ins. Co.* v. *Gehner, Assessor,*

supra; Farmers and Mechanics Savings Bank of Minneapolis v. *Minnesota*, 232 U. S. 516, 58 L. Ed. 706, 34 S. Ct. 354; and *New Jersey Realty Title Ins. Co.* v. *Division of Tax Appeals*, 338 U. S. 665, 94 L. Ed. 439, 70 S. Ct. 413.

3. On the other hand, a state may levy a property tax on the ownership interests of the shareholders of a corporation, even though all the assets of the corporation are federal securities and even though the net worth of the corporation is used as the measure of the value for such taxation of the ownership interests in the corporation. See for example *Cleveland Trust Co.* v. *Lander*, 184 U. S. 111, 46 L. Ed. 456, 22 S. Ct. 394, affirming 62 Ohio St., 266, 56 N. E. 1036; *Aberdeen Bank* v. *Chehalis County*, 166 U. S. 440, 41 L. Ed. 1069, 17 S. Ct. 629; *National Bank* v. *Commonwealth*, *supra*; and *Des Moines National Bank* v. *Fairweather, Mayor*, 263 U. S. 103, 68 L. Ed. 191, 44 S. Ct. 23.

As stated in the leading case of *Van Allen* v. *Assessors*, 70 U. S. (3 Wall.), 573, 583, 18 L. Ed. 229:

"* * * the tax on the shares is not a tax on the capital of the bank. The corporation is the legal owner of all the property of the bank, real and personal; and within the powers conferred upon it by the charter, and for the purposes for which it was created, can deal with the corporate property as absolutely as a private individual can deal with his own. This is familiar law, and will be found in every work that may be opened on the subject of corporations. A striking exemplification may be seen in the case of *Queen* v. *Arnoud* [9 Adolph & E. N. S. 806]. The question related to the registry of a ship owned by a corporation. Lord Denman observed: 'It appears to me that the British corporation is, as such, the sole owner of the ship. The individual members of the corporation are no doubt interested in one sense in the property of the corporation, as they may derive individual benefits from its increase, or loss from its decrease; but in no legal sense are the individual members the owners.'

"The interest of the shareholder entitles him to participate in the net profits earned by the bank in the employment of its capital, during the existence of its charter, in

proportion to the number of his shares; and, upon its dissolution or termination, to his proportion of the property that may remain of the corporation after the payment of its debts. This is a distinct, independent interest or property, held by the shareholder like any other property that may belong to him. Now, it is this interest which the act of Congress has left subject to taxation by the states, under the limitations prescribed * * *."

Furthermore, merely because a statute requires a corporation primarily to pay a property tax on the ownership interests of its shareholders, such tax is not necessarily a tax on the property of the corporation. See for example *Cleveland Trust Co.* v. *Lander, supra; Aberdeen Bank* v. *Chehalis County, supra;* and *Des Moines National Bank* v. *Fairweather, Mayor, supra.*

As stated in the opinion in the leading case of *National Bank* v. *Commonwealth, supra:*

"But it is strongly urged that it is to be deemed a tax on the capital of the bank, because the law requires the officers of the bank to pay the tax on the shares of its stockholders. Whether the state has the right to do this we will presently consider, but the fact that it has attempted to do it does not prove that the tax is anything else than a tax on these shares. It has been the practice of many of the states for a long time to require of its corporations, thus to pay the tax levied on their shareholders. It is the common, if not the only, mode of doing this in all the New England states, and in several of them the portion of this tax which should properly go as the shareholder's contribution to local or municipal taxation is thus collected by the state of the bank and paid over to the local municipal authorities. In the case of shareholders not residing in the state, it is the only mode in which the state can reach their shares for taxation. We are, therefore, of the opinion that the law of Kentucky is a tax upon the shares of the stockholder."

As to the Society for Savings, the answer to the question, whether the tax provided for by Section 5408, General Code, may be levied without excluding federal securities from the computation provided for in Section 5412, General Code,

depends on whether the tax is or is not on the property *of* the corporation which is the owner of those federal securities, or on part or all *of its* net worth. This in turn depends upon the meaning of the words in Section 5408, General Code, "the capital employed, or the property representing it, in a financial institution the capital of which is not divided into shares, or which has no capital stock." Admittedly, the capital of the Society for Savings is not divided into shares and it has no capital stock.

In considering these statutory words, the question immediately arises as to whose "capital" or whose "property" is to be taxed. Is it the capital or property of the financial institution or is it the capital or property of the owners of the financial institution?

On a hasty reading of these words, it might appear reasonably arguable that, standing alone, these words could be given either meaning.

However, if these statutory words are examined with reasonable care, it is difficult to comprehend how "capital employed, or the property representing it, in a financial institution" could properly be used to describe capital or property of and belonging to such institution. It is apparent from a reading of Section 5412, General Code, that these words could not have been intended to describe all the assets of the bank. That section provides for assessing "the value of the property representing the capital employed by such financial institution * * * at the aggregate amount of the capital, the surplus or reserve fund and the undivided profits." So far as the corporation is concerned, such an amount is a mere bookkeeping figure and is not represented by any property of the institution. See *Southern Gum Co.* v. *Laylin*, 66 Ohio St. 578, 596, 64 N. E. 564. The property of the institution is an important factor in determining what it is but there is another equally important factor in its determination, that is, the debt obligations of the institution including its deposit obligations. On the other hand, the interests of the owners of the corporation are as to them a species of intangible property and are sometimes described as their capital investment in the corporation or the capital which the owners have "*in*" the corporation. As so used,

such "capital employed * * * in" the corporation is always regarded as a species of intangible property belonging to such owners. As to them, their intangible property interest in the corporation may well be said to be "property representing" their "capital employed * * * in" the corporation.

Furthermore, the General Assembly clearly disclosed that it knew how to use the word "capital" to describe the capital of the corporation. Thus, after referring to "the capital employed * * * *in* a financial institution," it used the words "*the capital of which* is not divided into shares, or *which has no capital stock*." If it had intended the words "the capital *employed* * * * *in* a financial institution" to mean "the capital *of*" such institution, it could easily have said "the capital of a financial institution [which is] not divided into shares" instead of "the capital employed, or the property representing it, in a financial institution the capital of which is not divided into shares," thus eliminating the use of at least nine words and clearly expressing that intent. The General Assembly did not do that. By using the words "capital employed * * * in" instead of "capital of" a financial institution at the same time that it showed that it knew how to use the words "capital of" such an institution, the General Assembly clearly indicated an intention to distinguish between the capital of or belonging to such institution and the capital of and belonging to the owners and employed *in* the institution.

In addition, when the whole of Section 5408, General Code, is read, it is apparent that it is the capital or property of the owners of the institution and not that of the institution which the General Assembly intended to describe by the use of the words "the capital employed, or the property representing it, in a financial institution the capital of which is not divided into shares, or which has no capital stock."

Section 5408, General Code, deals with three distinct objects of taxation:

(1) "Shares of * * * stockholders in a financial institution * * * incorporated * * * the capital stock of which is divided into shares."

(2) "Shares of * * * stockholders in an unincorporated financial institution * * * the capital stock of which is divided into shares held by the owners of such financial institution."

(3) "The capital employed, or the property representing it, in a financial institution the capital of which is not divided into shares, or which has no capital stock."

As to the first two objects of taxation, it is clear that the property intended to be taxed is that of the owners of the financial institution, that is, its shareholders, and not the property of the financial institution. It would not be reasonable to impute to the General Assembly an intent, with respect to the third object of taxation there dealt with, to provide for taxing the property of the financial institution, instead of the property of the owners of the financial institution, unless the language used clearly required the imputation to the General Assembly of such an inconsistent intent.

With respect to statutory provisions somewhat similar to Section 5409, General Code, it is said in the opinion in *Des Moines National Bank* v. *Fairweather, Mayor, supra*, at pages 110 and 111:

"As construed by the Supreme Court of the state, the statute as a whole contemplates * * * that the shares be assessed to the stockholders as their property; and as illustrating that the statute makes a clear distinction between the shares and the property of the bank, the court points to the provision which requires that the real estate be assessed against the bank and to the succeeding provision which declares that 'the property of such corporation shall not be otherwise assessed.' This, without more, seems completely to refute the contention that what the statute really directs is an assessment of the bank's property instead of the stockholders' shares."

Likewise Section 5412, General Code, makes it apparent that the General Assembly intended to tax the property of the owners of financial institutions with respect to all three of the above mentioned objects of taxation dealt with in Section 5408, General Code. Thus the first sentence of

that section provides for a uniform manner of ascertaining and assessing the amount at which the property is to be taxed with respect to all three of those objects of taxation.

Also, that sentence obviously regards "shares of stockholders in a financial institution [as appears from Section 5408, General Code, these are the "shares" meant]" which has shares as having a taxable equivalent in a financial institution which has no shares. It describes that taxable equivalent as "the value of the property representing the capital *employed by* [not "of"] such financial institution, not divided into shares." "Shares of stockholders in a financial institution" obviously are evidence of and represent "capital employed by" a financial institution where it has shares. See Section 5408, General Code.

The legislative intent, that the words "capital employed in" or "by" a financial institution not having shares should describe the intangible property interest of the owners of such an institution just as the words "shares in" do, is further demonstrated by the words of Section 5638-1, General Code, levying the tax on "the kinds and classes of intangible property * * * enumerated" including "shares in and capital employed by financial institutions."

Such conclusion is further fortified by the last sentence of Section 5412, General Code, which deals with financial institutions having only withdrawable shares. By the provision of Section 5324, General Code, such shares are defined as "deposits"; and, in describing the first of the three above-mentioned objects of taxation dealt with in Section 5408, General Code, the shares of such institutions are expressly excepted from the shares of the classification of financial institutions there involved. Under Section 5406, General Code, those withdrawable shares must be returned as deposits. Under the first sentence of Section 5412, General Code, their amounts are assessed for taxation as deposits but not as "shares." However, the last sentence of Section 5412, General Code, provides for their assessment also as shares and states with respect to them that "such assessment of shares shall exclude the capital stock thereof * * * [already assessed as deposits] but shall include the surplus or reserve and undivided profits * * *." *First*

Federal Savings & Loan Assn. of Warren v. *Evatt, Tax Commr.*, 143 Ohio St., 243, 54 N. E. (2d), 795.

Our conclusion is that the words, "capital employed, or the property representing it, in a financial institution the capital of which is not divided into shares, or which has no capital stock" as found in Section 5408, General Code, the words "the value of the property representing the capital employed by such financial institution, not divided into shares" as found in Section 5612, General Code, and the words "capital employed by financial institutions" as found in Section 5638-1, General Code, were intended by the General Assembly in each of those sections to describe the intangible property interests of ownership in a financial institution and not to describe the capital or any of the property of or belonging to such an institution. It follows that, where a financial institution without capital divided into shares or without capital stock is a corporation, the General Assembly indicated an intent to impose a tax upon the intangible property interests of ownership of the owners of the corporation, and not a tax upon the capital of or any property of or belonging to the corporation. The Society for Savings is such an incorporated financial institution.

However, it is argued that such a legislative intention cannot be given effect because there is no statutory provision which would enable the Society for Savings to secure reimbursement from those whose property would be taxed for the tax thereon that the Society for Savings would be required to pay.

In Sections 5672 and 5673, General Code, provisions are made to insure reimbursement from its shareholders by a financial institution on account of taxes paid by it which were assessed on its nonwithdrawable shares. Likewise provisions to insure reimbursement on account of payment by a financial institution of taxes assessed upon its deposits as taxable property of its depositors and its withdrawable shares as taxable property of its shareholders are made in Sections 5673-1 and 5673-2, General Code. However, it is arguable that, unless these latter two sections are given a broader construction than their words appear to justify, there is no specific statutory provision which would enable

an incorporated financial institution, the capital stock of which is not divided into shares or which has no capital stock, to secure reimbursement from those who are or may be owners of the intangible property representing the capital employed by such owners *in* the corporation. In our opinion, such a provision is not necessary to enable such a financial institution to secure such reimbursement. *Citizens National Bank* v. *Commonwealth of Kentucky*, 217 U. S. 443, 54 L. Ed 832, 30 S. St. 532; *Aberdeen Bank* v. *Chehalis County*, *supra*; and *National Bank* v. *Commonwealth*, *supra*.

With respect to that species of intangible property which represents the ownership interests in a corporation, the capital of which is not divided into shares or which has no capital stock, payment by the financial institution of the tax will always in effect amount to payment by those who are the beneficial owners of such intangible property. Such payment will necessarily reduce the amount, which the corporation will have available for payment of interest to depositors or holders of withdrawable shares and which will be available for protection of their deposits or stock claims and for distribution to them in the event of liquidation of the corporation. Thus, the financial institution, which pays the tax on their property interests in the corporation, will always be able to reimburse itself by reducing the ultimate value of the property interests of those who are the only ones who can have any claim to benefit from the ownership interests taxed.

Payment by the corporation of the tax on their intangible ownership interests in the corporation will necessarily reduce, to the extent of the payment made, those funds available for payment of interest on their deposits, and will likewise reduce the amount available only to them in the event of liquidation of the corporation. In the instant case, it appears that there was available for payment of interest on deposits more than enough to pay the taxes assessed against the owners of the "capital employed in" and "by" the Society for Savings as measured by the provisions of Section 5612, General Code, for assessment of that "capital." That capital, as well as their deposit claims, was owned by the depositors.

The decision actually rendered by this court in *Collett, Treas.* v. *Springfield Savings Society*, 56 Ohio St. 776, 49 N. E. 1109 (affirming without opinion 13 C. C. 131, 7 C. D. 146), is not inconsistent with such a conclusion.

In the opinion of *Bank Commissioners* v. *Watertown Savings Bank*, 81 Conn. 261, 70 A. 1038, it is said:

"It is true that the profits or income of savings-banks are not all payable at the same time or in the same way, and that they may be held by the bank as a fund until they have reached a specified amount. This is for the sole purpose of protecting depositors against unforeseen contingencies. There is nothing in these statutes which militates against the general proposition that the income or profits of savings-banks belong to the depositors and are a part of the deposits. In the end, it is the general spirit and purpose of the charters of savings-banks and of the laws of this state, that depositors, or their representatives, are entitled to all the pecuniary benefits arising from the deposits, less the reasonable expenses that may be chargeable thereon."

In *Barrett* v. *Bloomfield Savings Institution*, 64 N. J. Eq. 425, 54 A. 543 ("affirmed, for the reasons stated," 66 N. J. Eq. 431, 57 A. 1131), it is said on page 434 in the opinion in quoting with approval from the opinion in *Hannon* v. *Williams*, 7 Stew Eq. 255:

" 'In a savings bank the depositors bear, in great degree, the same relation to each other and to the property of the bank as do the stockholders in other monetary institutions. To the corporation itself they occupy the double relation of stockholders and creditors. In prosperity they are the stockholders among whom the profits are divided. In case of insolvency they are the creditors, and usually the only creditors, among whom the remaining assets are to be distributed.' "

In *Huntington* v. *Savings Bank*, 96 U. S. 388, 24 L. Ed. 777, it is said in the opinion by Mr. Justice Strong:

"* * * the primary idea of a savings bank has been, that it is an institution in the hands of disinterested persons,

the profits of which, after deducting the necessary expenses of conducting the business, inure wholly to the benefit of the depositors, in dividends, or in a reserved surplus for their greater security."

In *Lewis, Admr.*, v. *Lynn Institution for Savings*, 148 Mass. 235, 19 N. E. 365, 12 Am. St. Rep. 535, 1 L. R. A. 785, it is said on page 243 in the opinion by Allen, J.:

"* * * the fundamental idea has never been departed from, that all the funds and investments of a savings bank are held exclusively for the benefit and security of the depositors. This idea was, and still is, the corner stone of the whole system. There is no corporation, with any purpose or possibility of profit to itself, independently of the depositors; but the latter are to share whatever profit may be made in just proportion among themselves. * * *"

In *Cogswell* v. *Rockingham Ten Cents Savings Bank*, 59 N. H. 43, it is said in the opinion by Clark, J.:

"The assets of savings-banks consist of loans of money made by them for the benefit of their depositors, from whom the money was derived, and correspond to the capital stock in banks of discount, and depositors in savings-banks stand in the same relation to the assets of the bank as stockholders to banks of discount."

See also *Worcester County Inst. for Savings* v. *City of Worcester*, 10 Cushing (Mass.), 128, and *Providence Inst. for Savings* v. *Gardner*, 4 R. I., 484, indicating that the depositors of an incorporated financial institution having no capital stock, in addition to being creditors of the corporation, have ownership interests in such corporation corresponding to the ownership interests of the shareholders in an incorporated financial institution having shares of capital stock.

Thus, the ownership interests of the depositors in the corporation and not any capital or property of or belonging to the corporation are the property which is to be taxed pursuant to Section 5408, General Code, assessed pursuant to Section 5412, General Code, and upon which the two-mill tax is levied under Section 5638-1, General Code; and it appears that the corporation, although required to pay the

tax, will, in doing so, be imposing the full burden of that tax on those whose property interests are taxed.

It is further argued, in effect, that the value of the interests of a depositor in the Society for Savings can never rise above the amount of his deposit unless the corporation goes into liquidation, that anyone by making a deposit can secure interests equal to that of an existing depositor having a deposit of the same amount, and that therefore a depositor's interests cannot be subjected to taxation at an amount in excess of the amount of his deposit.

This argument might be persuasive if it were true that the property interest of a shareholder of a corporation could not be taxed at an amount equal to the book value of his shares in the corporation where such book value exceeded the actual value of the shares. We do not believe that any such contention could or even would be made. The book value of shares of stock may be more or less than the value of such shares. It may be much more. *Opdyke* v. *Security Savings & Loan Co.*, 157 Ohio St., 121, 148, 105 N. E. (2d), 9.

On the other hand, as to a depositor in a corporation such as the Society for Savings, it is not likely that the total of the amount of his deposit plus the amount of the book value of his ownership interest as a depositor (this total being the book value of all his interests in the corporation) will ever be much more than what he can withdraw in cash at any time. When taxed on that total, *i.e.* the book value of all his interests in the corporation rather than only on the lesser withdrawable amount of his deposit, a depositor of such corporation is not exposed to as great a taxation hazard as is a shareholder of a bank, who may be taxed on the book value of his shares even though such shares have no withdrawable value and have a realizable market or even actual value very much below their book value.

Unlike in *Home Savings Bank* v. *Des Moines*, 205 U. S., 503, 51 L. Ed., 901, 27 S. Ct., 571, our statutes do not justify our reaching a conclusion in the instant case similar to that reached by the Iowa Supreme Court in that case, that the taxes are levied on the corporation. As hereinbefore pointed out, the property to be taxed under our statutes is "the capital employed * * * in" or "by" a financial insti-

tution, that is, the intangible property interests of ownership of the owners of the institution representing that capital, not the capital *of* the financial institution. The "taxes" here involved are "*levied* on * * * kinds and classes of intangible property * * * enumerated," including "shares in and capital employed by [not capital of] financial institutions"; and, as hereinbefore pointed out, the General Assembly clearly indicated an intention that it is the capital of the owners of the institutions and not of the institutions that is to be taxed. See Sections 5408 and 5412, General Code.

As we view it, the *Des Moines case* holds merely that the fact, that a bank may in effect reimburse itself from its shareholders on account of a tax levied against it on its net worth, will not justify the conclusion that, in computing such net worth, it is unnecessary to exclude federal securities. Here, unlike in that case, the taxes are not levied against the corporation on the capital or net worth of the corporation but are levied against the ownership interests of the owners of the corporation, whether or not such ownership interests are evidence by shares or capital stock.

As stated on page 518 in the opinion in that case:

"The tax assessed to shareholders may be required by law to be paid in the first instance by the corporations themselves, as the debt and in behalf of the shareholder, leaving to the corporation the right to reimbursement for the tax paid from their shareholders, either under some express statutory authority for their recovery or under the general principle of law that one who pays the debt of another at his request can recover the amount from him. *National Bank* v. *Commonwealth*, 9 Wall., 353; *Lionberger* v. *Rouse*, 9 Wall., 468; *Aberdeen Bank* v. *Chehalis County*, 166 U. S., 440; *Merchants Bank* v. *Pennsylvania*, 167 U. S., 461; *Cleveland Trust Co.* v. *Lander*, 184 U. S., 111. The theory sustaining these cases is that the tax was not upon the corporations' holdings of bonds, but on the shareholders' holding of stock, and an examination of them shows that in every case the tax was assessed upon the property of the shareholders and not upon the property of the corporation. There is nothing in them which justifies the tax under con-

sideration here, *levied*, as has been shown, on the corporate property."

It may be observed that the *Des Moines case* involved "a tax * * * levied under a law * * * which provided that 'shares of stock of state * * * banks * * * shall be assessed to such banks * * * and not to the individual stockholders.'" At the same time, the statutes of that state expressly provided that shares of stock of national banks should be assessed to the individual stockholders.

That *Farmers & Mechanics Savings Bank of Minneapolis* v. *Minnesota*, *supra*, is not applicable appears from the following in the court's opinion:

"The Supreme Court of Minnesota held that this section imposed * * * a property tax, and that the surplus *of* savings banks as thus determined is taxable property. This construction is not questioned here; perhaps is not open to question." (Emphasis added.)

Likewise, the cases of *Missouri, ex rel. Missouri Ins. Co.* v. *Gehner, Assessor*, *supra*, and *New Jersey Realty Title Ins. Co.* v. *Division of Tax Appeals*, *supra*, each involved the levy of a tax against a corporation on part or all of the net worth of the corporation. As hereinbefore pointed out, the taxes in the instant case are not levied on any part of the net worth of the financial institutions but are levied on the interests of the owners of such institutions in the capital of such institutions, whether evidenced by shares of stock or not so evidenced.

The decision of the Board of Tax Appeals is reversed and the order of the Tax Commissioner is affirmed.

Decision reversed.

WEYGANDT, C. J., MIDDLETON, ZIMMERMAN and LAMNECK, JJ., concur.

STEWART, J., dissenting. I am unable to agree with the conclusion of the majority of the court with reference to the taxation of the capital employed, or the property representing it, in a financial institution, the capital of which is not divided into shares, or which has no capital stock.

Ever since Chief Justice Marshall's historic opinion in

M'Culloch v. *Maryland*, 17 U. S., 316, 4 L. Ed., 579, both by judicial decision and legislative fiat a state can not levy a property tax on federal securities, no matter who may be the owner of them.

Section 5408, General Code, as stated in the majority opinion, deals with three distinct objects of taxation:

(1) "Shares of * * * stockholders in a financial institution * * * incorporated * * * the capital stock of which is divided into shares."

(2) "Shares of * * * stockholders in an unincorporated financial institution * * * the capital stock of which is divided into shares held by the owners of such financial institution."

(3) "The capital employed, or the property representing it, in a financial institution the capital of which is not divided into shares, or which has no capital stock."

I entirely agree with the majority that the shares of a financial corporation may be taxed and that the value of the shares may be ascertained by adding the amount of the capital, the surplus or reserve fund, and the undivided profits, without any deduction of federal securities in those items. This is so because it has long been held that the shares of a financial institution are a property apart from the assets of the institution, and in Ohio the tax on such shares, although levied in the name of the institution, is really a tax on the owners of the shares, and Sections 5672 and 5673, General Code, provide for reimbursement to the financial institution from the shareholders for the payment of the tax assessed on the shares.

I likewise agree that a tax may be levied on the deposits in a financial institution for, again, that tax is on credits which are owned by the depositors.

Where one has a deposit in a financial institution, the relation of debtor and creditor arises, and a deposit, therefore, is not an asset of the institution but is, indeed, a liability because the institution owes the amount of it to the depositor.

In Ohio the tax on a deposit is on property separate and apart from any assets of the bank and, although assessed

in the name of the bank, it is really against the depositor, and in Sections 5673-1 and 5673-2, General Code, provision is made for reimbursement to the bank from the depositor for the tax paid on the deposit.

However, in reference to the provision for taxing the capital employed, or the property representing it, in a financial institution, the capital of which is not divided into shares, or which has no capital stock, I am of the opinion that such a tax can not be assessed without first deducting federal securities which are a part of the property to be taxed. Such a tax, as stated in Section 5412, General Code, is on the aggregate amount of the capital, surplus, reserve fund, and the undivided profits. The tax is assessed against the financial institution itself and there is no provision for such institution to recover from any one the tax paid as there is specifically made in reference to a tax on shares or deposits.

It is argued that the tax assessed against such an institution without shares is, in actuality, assessed against the owners of the capital, surplus, reserve fund, and undivided profits, and that such owners are the depositors in the institution.

Admitting that there is no way for the institution to obtain reimbursement from such depositors for the tax paid on the assets, yet it is said that the depositors really pay it because the tax creates a decrease in the assets of the institution in which they have intangible rights. It would not be contended that a tax could be assessed against the capital, surplus, reserve fund, and undivided profits of a bank with shares, without deducting any federal securities from the property assessed, and yet the same argument could be made to the effect that such a tax was against the shareholders because it would decrease the amount of assets in the bank, which they, as shareholders, own.

What depositors own the capital, surplus, reserve fund, and undivided profits of a financial institution without shares?

The majority opinion asserts that present depositors own it.

Why should one who becomes a depositor today own a share of the surplus and undivided profits of a savings

institution, which have been built up by present long time depositors and by great numbers of past depositors who have drawn out their deposits (and that is all they can get), but whose deposits have built up the surplus assets of the institution?

It seems to me that when it is said that the depositors own the capital, surplus, reserve fund, and undivided profits of a financial institution, it is going to be an impossible task to ascertain what depositors own such assets and in what proportions.

Where a deposit is made in a bank, the bank is a debtor of the depositor, and, assuredly, at least during the corporate existence of the bank, the depositor can receive nothing in excess of the actual deposit he made.

Assuming that the depositors do own the capital employed, or the property representing it, in a financial institution without shares, it seems to me that it would still be unlawful to assess a tax against such property without deducting any federal securities therefrom. A state cannot levy a property tax on federal securities, regardless of who owns them.

It is conceded in the majority opinion that the tax against the capital employed or the property representing it can not be assessed if such capital and property belong to the financial institution itself. In my opinion, the same inhibition against assessing the tax exists, where such capital employed or the property representing it is owned by any person or group of persons whether known or unascertainable. The ownership of the property is not essential. The vice in the tax assessment is in taxing property which includes federal securities, without the deduction of such securities.

In the case of *Farmers & Mechanics Savings Bank of Minneapolis* v. *State of Minnesota*, 232 U. S. 516, 58 L. Ed. 706, 34 S. Ct. 354, it was held, in paragraph three of the L. Ed. headnotes:

"A state, in taxing as credits the surplus of a savings bank, ascertained by deducting from its assets the amount of its deposits and other accounts payable, must leave out of the computation of its assets bonds issued by territorial

municipalities which are exempt fr. n taxation as the obli gations of an agency of the federal gov rnment."

That case concerned a savings bank having no capital stock and taxable under a Minnesota law which provided for ascertaining the surplus remaining after deducting from its assets (other than real estate which was separately assessed) the amount of the deposits and all other account payable, the surplus being taxed as "credits."

The Supreme Court of Minnesota had held that the state law imposed not a franchise but a property tax and that the surplus of the savings bank as thus determined was taxable property.

In the opinion Justice Pitney said:

"It is, however, further suggested that the judgment under review does not sustain a tax upon the bonds as property, but only a tax upon the surplus of the savings bank, computed by taking into the account all of its assets, amounting to about $12,000,000, of which the bonds were only about $700,000, and deducting therefrom its liabilities. But as the surplus is treated as property and taxed as such, it is obvious that some portion of the burden of the tax is attributable to the ownership of the municipal bonds. In *Bank of Commerce* v. *New York City*, 2 Black 620, it was held that the state of New York in taxing the capital of banks according to its valuation must leave out of the calculation that portion of the capital invested in the stocks, bonds, or other securities of the United States not liable to taxation by the state. And see *Bank Tax Case*, 2 Wall. 200; *Home Savings Bank* v. *Des Moines*, 205 U. S. 503, 509.

"It results that the inclusion of the bonds now in question in the list of the assets of plaintiff in error, in ascertaining its surplus for the purpose of imposing a state property tax thereon, was repugnant to the Constitution of the United States."

There is no claim anywhere in the majority opinion here that the imposition of the tax concerned anything but a property tax, so it seems to me that the decision of the *Farmers & Mechanics Savings Bank case, supra*, is dispositive of the question before us.

In *People, ex rel. Bank of Commerce v. Comrs. of Texas*, 67 U. S. 620, 17 L. Ed. 451, it was held, in the L. Ed. headnotes:

"The stock of the United States, constituting a part or the whole of the capital stock of a bank organized under the banking laws of New York, is not subject to state taxation.

"It makes no difference that the tax is on the aggregate of the tax payer's property, and the stock is not taxed by name."

If the capital stock of a bank with shares can not be taxed without deducting any federal securities, how is it legally possible to so tax such capital stock of a savings bank without shares?

It can be much more cogently argued that the tax assessed against the capital of the bank with shares would be borne more acutely by the shareholders than would the tax assessed against the capital of the bank without shares be borne by its depositors.

It seems to me that taxing the capital employed, or the property representing it, and ascertaining its value at the aggregate amount of the capital, the surplus or reserve fund, and the undivided profits, without deducting therefrom any federal securities contained therein, is repugnant to the Constitution of the United States, regardless of who the owner of that property may be, and that a judgment upholding such procedure is in direct conflict with the declaration of the Supreme Court of the United States in the *Farmers & Mechanics Saving Bank case, supra.*

It must be remembered that the present case involves the imposition of a tax and not a claim for exemption from one. In such a situation, the law must be strictly construed against the taxing authority.

APPENDIX B

JOURNAL ENTRY OF THE OHIO BOARD OF TAX APPEALS

Dated March 2, 1953

BEFORE THE BOARD OF TAX APPEALS DEPARTMENT OF TAXATION
STATE OF OHIO

SOCIETY FOR SAVINGS IN THE CITY OF CLEVELAND,
Appellant,

vs.

JOHN W. PECK, TAX COMMISSIONER OF OHIO
Appellee.

March 2, 1953

No: 22464

ENTRY

This cause and matter came on to be considered by the Board of Tax Appeals upon an appeal filed herein under date of August 21, 1952 by the appellant above named from a final order of the Tax Commissioner dated July 30, 1952 in and by which final order the Tax Commissioner denied appellant's application for a certificate of abatement for the alleged overpayment of intangible taxes for the years 1947 through 1951.

The cause was submitted on the notice of appeal, the Tax Commissioner's transcript for the years in question, an agreed statement of facts signed by counsel, the evidence presented to this Board at a hearing upon the appeal, and briefs of counsel.

The notice of appeal, as filed with the Board of Tax Appeals, reads as follows:

> "Society for Savings in the City of Cleveland, appellant, hereby gives notice of its appeal to the Board of Tax Appeals from the findings of the Tax Commissioner, made on the 30th day of July, 1952. A true copy of the notice of said findings, sent by the Tax Com-

missioner to appellant, is attached hereto and incorporated herein by reference.

Appellant claims that said findings are erroneous in that they determine that there has not been any overpayment by the appellant of its intangible taxes for the years 1947 through 1951. The assessments of said taxes, as the findings of the Tax Commissioner correctly infer, included in the valuation of appellant's capital employed, obligations of the United States owned by appellant. The value of such obligations of the United States, should have been excluded, in assessment of the tax, because the Constitution of the United States, as interpreted by the Supreme Court of the United States, and the provisions of Section 742, Title 31, United States Code, require or provide that obligations of the United States shall be exempt from taxation by any State. Such exemption, if accorded to obligations of the United States owned by appellant, would have left none of appellant's capital subject to tax by the State of Ohio for the years in question. Consequently, the entire amount of taxes paid to the State of Ohio, for the years 1947 through 1951, namely $126,115.96, was overpaid, and appellant is entitled to a certificate of abatement for the same pursuant to Section 1464-3, Ohio General Code; and the findings of the Tax Commissioner were erroneous as a matter of law."

The final order of the Tax Commissioner complained of reads as follows:

"This day the application of Society for Savings in the City of Cleveland, Cleveland, Ohio a financial institution, for a Certificate of Abatement for the alleged overpayment of intangible taxes for the years 1947 through 1951 came on to be considered.

The taxpayer filed a timely application for a Certificate of Abatement for the years above mentioned contending that the taxes for said years were overpaid because the assessments included obligations of the United States. The Tax Commissioner finds that the application is based upon the provisions of Section 742, Title 31, United States Code.

Upon consideration of all the available evidence the Tax Commissioner finds that there has been no overpayment for the years in question and it is therefore ordered that this application be and the same hereby is denied."

The agreed statement of facts filed with the Board of Tax Appeals under date of November 12, 1952, reads as follows:

"The parties hereto, by their counsel duly authorized, hereby stipulate and agree that the following facts are true:

Appellant, Society for Savings in the City of Cleveland, is an incorporated financial institution, a mutual savings bank, which has no capital stock. It was originally incorporated pursuant to a special act of the General Assembly of Ohio passed in 1849 (47 O. L. 279), supplemented by acts passed in 1866 (63 O. L. 62) and in 1877 (74 O. L. 26). It reincorporated in the year 1933, as a mutual savings society, pursuant to Sections 710-148a to 710-148 l, inclusive, General Code, by filing its certificate of election pursuant to Section 710-148k, General Code. Appellant's office and place of business are located at 127 Public Square, Cleveland, Ohio.

Each of appellant's financial institution tax returns for the years 1947 to 1951, inclusive, included in its statement of resources under Item 3 thereof, the book value of United States bonds, treasury notes, certificates of indebtedness and treasury bills owned by appellant. The amounts of such obligations of the United States so included in such tax returns for each of such years were as follows:

Year	*Book Value of U. S. Obligations*
1947	$105,468,000.00
1948	102,260,000.00
1949	99,238,000.00
1950	107,219,000.00
1951	97,930,785.40

The tax returns filed by appellant, Society for Savings in the City of Cleveland, for the years here involved are true statements as to the books of account of the appellant for said years.

The amounts of the taxes assessed pursuant to the provisions of Section 5412, General Code, (excluding the taxes assessed on taxable deposits) for each of such years were as follows. Such amounts were paid by the appellant on the date indicated:

Year	*Amount of Tax*	*Date of Payment*
1947	$25,520.46	June 12, 1947
1948	25,595.58	June 28, 1948
1949	23,698.32	June 28, 1949
1950	24,843.04	June 29, 1950
1951	26,458.56	July 18, 1951
	$126,115.96	

Each party hereto reserves the right to object to the materiality or relevancy of any of the facts above stipulated, and each party reserves the right to offer additional evidence upon the trial of this case."

The pertinent portion of General Code Section 1464-3 (2), by virtue of which the appellant filed its application for a certificate of abatement with the Tax Commissioner reads as follows:

"* * *. On written application of any person, firm or corporation claiming to have overpaid to the treasurer of state, at any time within five years prior to the making of such application but not prior to January 1, 1938, any tax payable under any law which the department of taxation is required to administer, or on his own motion, to investigate the facts and to make, in triplicate, a written statement of his findings; and, if he shall find that there has been an overpayment, issue, in triplicate, a certificate of abatement, payable to the taxpayer or his or its assigns or legal representative and showing the amount of the overpayment and the kind of tax overpaid. * * *.

The question presented to us for solution in this case can be stated as follows:

Was the Tax Commissioner in error

(1) in not finding that the appellant had overpaid its intangible taxes for the years 1947 through 1951, and

(2) in not issuing certificates of abatement to appellant as prayed for in its application?

Or, the question may be stated in another way, to wit:

Was the Tax Commissioner in error in including in the tax base the value of federal securities owned by appellant in assessing, pursuant to Section 5412, General Code, the value of "property representing the capital employed by" appellant (a financial institution), the capital of which financial institution is not divided into shares?

The federal Constitutional provision and the federal statutory enactment relied on by appellant read as follows:

Constitution of the United States, Article I, Section 8, Clause 2:

"The Congress shall have power * * * To borrow money on the credit of the United States; * * *".

United States Code, Title 31, Section 742 (Revised Statutes, Section 3701)

"Except as otherwise provided by law, all stocks, bonds, Treasury notes, and other obligations of the United States, shall be exempt from taxation by or under State or municipal or local authority."

The taxation sections of the Ohio General Code involving financial institutions read as follows:

Section 5406:

"The deposits required to be returned by financial institutions pursuant to this chapter include all deposits as defined by section 5324 of the General Code to the extent that such deposits are made taxable by section 5328-1 of the General Code, excepting deposits belonging to the federal government or any instrumentality thereof; or deposits to the extent of advances or ad-

vance payments made under any contract entered into by the federal government or any instrumentality thereof for the production of materials or supplies or the furnishing of services pursuant to authority of any act to further the war effort; or deposits belonging to the state of Ohio or any county, municipal corporation, school district, township, or other subdivision thereof, or to any other financial institution, or to a dealer in intangibles or a domestic insurance company, or to an institution used exclusively for charitable purposes, or proceeds of loans which have been credited to the borrower but not disbursed, or advances by borrowers for the subsequent payment of specific obligations. If any deposit belonging to any of the classes required so to be returned consists in whole or in part of an amount representing uncollected checks and other uncollected items, credited thereto, one-half of the amount so represented shall be considered as withdrawable and to be so included in arriving at the aggregate balance of taxable deposits, required so to be returned, whether or not the depositor is in fact permitted to make withdrawals against the amount so represented and credited."

Section 5407:

"The term 'financial institution' as used in this chapter includes every person who keeps an office or other place of business, in this state, and engages in the business of receiving deposits, and of lending money, buying or selling bullion, bills of exchange, notes, bonds, stocks, or other evidences of indebtedness, with a view to profit. Provided that corporations or institutions organized under the provision of the act of congress, known as the federal farm loan act, approved July 17, 1916, and amendments thereto, and insurance companies, shall not be considered financial institutions or dealers in intangibles within the meaning of this chapter."

Section 5408.

"All the shares of the stockholders in a financial institution, located in this state, incorporated or organ

ized under the laws of the state or of the United States, the capital stock of which is divided into shares, excepting such as are defined as 'deposits' in Section 5324 of the General Code, and all the shares of the stockholders in an unincorporated financial institution located in this state, the capital stock of which is divided into shares held by the owners of such financial institution, and the capital employed, or the property representing it, in a financial institution the capital of which is divided into shares, or which has no capital stock, located in this state, shall be listed and assessed at the book value thereof, and taxed in the manner provided in this chapter."

Section 5409:

"The real estate of a financial institution shall be taxed in the place where it is located, in like manner as the real estate of persons is taxed; but the tax provided for in this chapter shall be in lieu of all other taxes on the other property and assets of such institution."

Section 5410:

"There shall be kept in the offices at all times where the business of such financial institution is transacted, a full and correct list of the names and residences of the stockholders therein, and the number of shares held by each, which, at all times during business hours, shall be open to the inspection of all officers who are or may be authorized to list or assess such shares for taxation, or to administer the laws relating to such assessment."

Section 5411:

"The cashier or other principal accounting officer of each incorporated bank, the secretary or other principal accounting officer of each other incorporated financial institution, the cashier, manager or owner of each unincorporated bank, and the manager, owner or owners of each other unincorporated financial institution, shall return to the department of taxation between the first and second Mondays of March, annually, a report exhibiting in detail, and under appropriate

heads, the resources and liabilities of such institution at the close of business on the thirty-first day of December next preceding."

Section 5411-1:

"On or before the fifth day of December annually, the tax commission of Ohio shall fix the day as of which the taxable deposits in financial institutions shall be listed and assessed. The day so fixed shall be between the first and the thirtieth days of November both inclusive and the action of the commission shall be taken not more than five days after the day so fixed. Notice of such action shall be immediately given to each financial institution and to the auditor of each county by registered mail, and the date so fixed shall be printed or stamped on the forms of return to be made by all financial institutions. The dates herein fixed for the action of the commission are directory merely, and if through inadvertence or mistake such action is not taken at the time herein prescribed, or the notice herein required to be given to a financial institution or a county auditor is not duly given, the remaining requirements of this chapter and the validity of any assessment made hereunder shall not be affected thereby."

Section 5411-2:

"The report of each financial institution made pursuant to Section 5411 of the General Code shall also show the aggregate balances of the taxable deposits of its depositors, in each county in which the institution maintained an office or offices for the receipt of deposits, at the end of business on the day fixed by the board of tax appeals pursuant to Section 5411-1 of the General Code. The report shall show also the names and addresses of all depositors whose deposits were wholly withdrawn from such institution between the day so fixed and the date on which notice of the fixing thereof was received by such institution, or if no such notice was received, then between the day so fixed and the first day of January next following, and the amount

of the taxable deposits of each such depositor on the day so fixed."

Section 5412:

"Upon receiving such report the tax commissioner shall ascertain and assess all the taxable shares of such financial institution, or the value of the property representing the capital employed by such financial institution, not divided into shares, at the aggregate amount of the capital, the surplus or reserve fund and the undivided profits as shown in such report, and the amount of taxable deposits of such institution in each county in which the institution maintained an office or offices for the receipt of deposits. Such amounts shall be assessed in the name of such financial institution excepting that the amounts of the taxable deposits wholly withdrawn from each such institution within the times mentioned in Section 5411-2 of the General Code and separately set forth in such report shall be subtracted from the amount of taxable deposits so assessed and separately assessed in the names of such respective depositors. In the case of an incorporated financial institution all of whose shares constitute deposits as defined in Section 5324 of the General Code such assessment of shares shall exclude the capital stock thereof as so shown but shall include the surplus or reserve and undivided profits so shown."

Section 5412-1:

"On or before the first Monday of May, annually, the tax commissioner shall certify to the auditor of state the assessment of each financial institution located in the state, showing separately the county in which the institution's principal office is located, and the amount or amounts of taxable deposits, if any, of branches in each county other than that in which such principal office is located, and to each county auditor the assessment of each taxable deposit separately assessed in the name of a depositor residing in his county. The auditor of state shall place the amount or amounts so certified

on the intangible property tax list in his office. The county auditor shall place the amounts so certified on the classified tax list and duplicate of his county in the names of the depositors represented by such certificates.

"Any certificate of abatement issued pursuant to Section 1464-3 of the General Code for the overpayment of the deposits tax or taxes imposed on shares of financial institutions or on capital employed by financial institutions may be tendered by the payee or transferee thereof to the treasurer of state as payment for any taxes allocable to the county in which the claim for overpayment arose."

Section 5638-1:

"Annual taxes are hereby levied on the kinds and classes of intangible property, hereinafter enumerated, on the intangible property tax list in the office of the auditor of state and duplicate thereof in the office of treasurer of state at the following rates, to wit:

"* * * deposits, two mills on the dollar; shares in and capital employed by financial institutions, two mills on the dollar; * * *."

Section 5672:

"Taxes assessed on non-withdrawable shares of stock, of a financial institution, shall be a lien on such shares from the first day of January in each year until they are paid.

"It shall be the duty of every financial institution to collect the taxes due upon its shares of stock from the several owners of such shares, and to pay the same to the treasurer of state and any financial institution failing to pay the said taxes as herein provided, shall be liable by way of penalty for the gross amount of the taxes due from all the owners of the shares of stock, and for an additional amount of one hundred dollars for every day of delay in the payment of said taxes."

Section 5673:

"Such financial institution paying to the treasurer of state the taxes assessed upon its shares, in the hands

of its shareholders respectively, as provided in the next preceding section, may deduct the amount thereof from dividends that are due or thereafter become due on such shares, and shall have a lien upon the shares of stock and on all funds in its possession belonging to such shareholders, or which may at any time come into its possession, for reimbursement of the taxes so paid on account of the several shareholders, with legal interest; and such lien may be enforced in any appropriate manner."

Section 5673-1:

"Taxes assessed on deposits in a financial institution in this state shall be a lien on the deposit of each person as of the day fixed by the tax commission of Ohio for the listing of such deposits. Taxes assessed on the shares of stock of such an institution, all of whose shares are withdrawable and defined as deposits in chapter four of this title, shall be a lien on such shares so defined as deposits as of the day so fixed. It shall be the duty of every financial institution to pay the taxes on the amount of such deposits and/or withdrawable shares assessed in its name to the treasurer of state and any such institution failing to pay such taxes as herein provided shall be liable by way of penalty for the gross amount of the taxes due on and with respect to all its deposits and withdrawable shares assessed in its name and for an additional amount of one hundred dollars for every day of delay in the payment of such taxes."

Section 5673-2:

"A financial institution so required to pay to the treasurer of state the taxes assessed upon its deposit accounts, as taxable property of its depositors, and or upon its withdrawable shares as taxable property of its shareholders respectively, as provided in the next preceding section, may, upon receipt of notice of the day fixed for the listing of such deposits, charge the amount thereof to and deduct the same from the deposit of each depositor, or from the interest that is due

or thereafter becomes due thereon, or from the dividends that are due or thereafter become due thereon, as the case may be, and shall have a lien upon such deposit, interest and/or dividends and on all funds in its possession belonging to such depositor or shareholder, or which may at any time come into its possession, for reimbursement of the taxes so payable, with legal interest. Such lien may be enforced in any appropriate manner at any time within six months after the payment of the taxes to the treasurer."

Appellant maintains that in assessing, under Section 5612 of the General Code, the "value of the property representing the capital employed" by an incorporated savings society, which has no capital stock, the State of Ohio must exclude from the assets of the institution the value of the United States obligations owned by it.

Appellant further says that Section 5612 General Code provides that the assessment of "property representing the capital employed" shall be measured by "the aggregate amount of the capital, the surplus or reserve fund and the undivided profits" as shown in the institution's annual tax report; and that the inclusion of the value of federal securities owned by such a financial institution in the tax base for assessing the capital employed by such institution in legal effect imposes a tax upon the securities in violation of Clause 2, Section 8, Article I of the United States Constitution and Federal Statute, Title 31, Section 742.

Appellant further says that it is apparent upon the face of the tax returns filed by appellant for the years 1947 through 1951 that the value of United States obligations owned by appellant in each year exceeded by many millions of dollars the total of its surplus or reserve funds and undivided profits and that the exclusion of the value of the United States obligations from the asset values used in computing surplus or reserves and undivided profits would have left no surplus or reserves or undivided profits subject to tax.

Appellant also says that since it is a financial institution having no shares, it necessarily follows that it has no

shareholders from whom it could seek reimbursement for any tax assessed on "the value of the property representing the capital employed," and thus the tax is assessed expressly and directly upon the appellant itself.

The Tax Commissioner says that appellant has voluntarily paid the taxes assessed against it on account of its surplus, reserves and undivided profits and that it can properly pass said taxes on to its depositors inasmuch as there is such an identity between the mutual fund and its depositors that when any such tax is paid the burden thereof is automatically passed on to the depositors.

With this contention of the Tax Commissioner we cannot agree—but even so the question as to whether the appellant may pass the tax on to its depositors is not in issue in this case—and in any event there is no statute which purports to give the appellant the right to pass this tax on to its depositors.

What we are interested in is the answer to this question:

> What is the nature and kind of property which has been assessed for taxation by the Tax Commissioner?

It appears to us to be clear that federal securities are the kind of property that has been assessed for taxation by the Tax Commissioner—for if federal securities are excluded from the Tax Commissioner's base the computation shows no tax due; and it likewise appears clear that the taxes have been assessed against the appellent corporation itself and not against any shareholders or depositors.

The distinction between taxing the shareholders upon their shares, and taxing the appellant upon its "capital or the property representing the capital employed" has been clearly drawn by our Supreme Court in the case of the *Cleveland Trust Company* vs. *Lander*, 62 Ohio State Reports at page 266, affirmed in 184 P. S. 111. That case involved the tax upon the shares as property of the shareholders, which was found constitutional, and the Court said at page 274:

> "Here lies the distinction. The tax is upon the shares and not upon the capital. If the tax was on the capital, the federal bonds would have to be deducted.

but being upon the shares no such deduction is required, allowed or authorized."

However, the decisions of the Supreme Court of the United States leave no room for doubt but that a State tax upon the "capital employed, or the property representing it" (General Code, Section 5408), of a corporation is unconstitutional and violative of the requirement of the federal statute if and to the extent that the value of federal securities is included in the tax base. The cases sustaining the foregoing conclusion of law extend over a long period of years. People v. Commissioners of Taxes, 2 Black 620 (1863); Bank Tax Case, 2 Wall. 200 (1864); Home Savings Bank v. Des Moines, 205 U. S. 503 (1906); Farmers and Mechanics Savings Bank v. Minnesota, 232 U. S. 516 (1914); Missouri v. Gehner, 281 U. S. 313 (1930); New Jersey Realty Title Insurance Company v. Division of Tax Appeals, 338 U. S. 665 (1950).

In a case where the issue was somewhat similar to that now before us this Board, in Stephenson and Potter v. Glander, 67 N. E. 2nd 14, 35 Ohio Opinions 368, 46 Ohio Law Abstract 203 (1946) said at page 370 of 35 Ohio Opinions:

> "In the consideration of the question thus presented it is recognized that the tax on dealers in intangibles provided for by Section 5414-1 et. seq., General Code, is a property tax as distinguished from a franchise tax or other form of excise taxes; and that in this case where the tax is on the appellant as an unincorporated dealer in intangibles, the tax is on the employed capital of the appellant itself—unlike the case where the dealer in intangibles is a corporation and the ultimate incidence of the tax is on the shares of stock as property of the shareholders. In this situation and recognizing that the greater bulk of the nontaxable securities here in question consists of United States government bonds, we are required to give application to the principle that the State has no power to assess against a corporation or other like entity a tax which is essentially a property tax, as distinguished from a franchise privilege or excise tax without allowing a deduction for sums invested in securities in the

United States; and this is true whether the tax purports to be one laid directly upon the property or upon the capital of such entity. Home Insurance Company of New York v. New York, 134 U. S. 594, 10 S. Ct. 593, 33 L. Ed. 1025; Home Savings Bank v. Des Moines, 205 U. S. 503, 509, 521, 27 S. Ct. 571, 51 L. Ed. 901."

And again at page 373—

"Although there is, admittedly, some doubt as to the authority of the Board of Tax Appeals as a quasi judicial tribunal to pass on the constitutionality of statutes and to strike down statutes determined by it to be unconstitutional, this Board, like courts and other tribunals possessing judicial or quasi judicial authority, is required to construe statutes so as to preserve, if possible, the provisions thereof as enacted."

With these thoughts in mind and upon the consideration of all the evidence before us we therefore find that the final order of the Tax Commissioner complained of was in error and said final order is hereby reversed.

We find that appellant, by virtue of the failure of the Tax Commissioner (in his computation of the "value of the property representing the capital employed") to exclude from its tax base the federal securities owned by appellant, has overpaid its intangible taxes for the years 1947 through 1951 in the amounts stated in its application for a certificate of abatement; and this case is hereby remanded to the Tax Commissioner with instructions to issue to appellant the certificate of abatement as requested.

I hereby certify the foregoing to be a true and correct copy of the action of the Board of Tax Appeals of the Department of Taxation this day taken with respect to the above matter.

(S.) Francis P. Howard,
Secretary.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 204

SOCIETY FOR SAVINGS IN THE CITY OF CLEVELAND,

Appellant,

vs.

JOHN W. PECK, TAX COMMISSIONER OF OHIO

APPEAL FROM THE SUPREME COURT OF OHIO

STATEMENT IN OPPOSITION TO APPELLANT'S STATEMENT OF JURISDICTION AND MOTION TO DISMISS OR AFFIRM

C. WILLIAM O'NEILL,
Attorney General,
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First Assistant Attorney General,
Counsel for John W. Peck,
Tax Commissioner.

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SUPREME COURT OF THE UNITED STATES

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No. 204

SOCIETY FOR SAVINGS IN THE CITY OF CLEVELAND,

Appellant,

vs.

JOHN W. PECK, TAX COMMISSIONER OF OHIO

STATEMENT IN OPPOSITION TO APPELLANT'S STATEMENT OF JURISDICTION AND MOTION TO DISMISS OR AFFIRM

---

1. Issues Presented on Appeal

Appellant is a mutual savings bank having no shares of capital stock. During the tax years in question it owned United States securities, the value of which exceeded the total value of its surplus, reserves and undivided profits. Ohio levies a tax against the ownership interests in financial institutions. The pertinent sections of the Ohio law are as follows:

Section 5408, General Code

"All the shares of the stockholders in a financial institution, located in this state, incorporated or organ-

ized under the laws of the state or of the United States, the capital stock of which is divided into shares, excepting such as are defined as 'deposits' in section 5324 of the General Code, and all the shares of the stockholders in an unincorported financial institution, located in this state, the capital stock of which is divided into shares held by the owners of such financial institution, and the capital employed, or the property representing it, in a financial institution the capital of which is not divided into shares, or which has no capitol stock, located in this state, shall be listed and assessed at the book value thereof, and taxed in the manner provided in this chapter."

Section 5412, General Code

"Upon receiving such report the tax commission of Ohio shall ascertain and assess all the taxable shares of such financial institution, or the value of the property representing the capital employed by such financial institution, not divided into shares, at the aggregate amount of the capital, the surplus or reserve fund and the undivided profits as shown in such report, and the amount of taxable deposits of such institution. Such amounts shall be assessed in the name of such financial institution excepting that the amounts of the taxable deposits wholly withdrawn from each such institution within the times mentioned in section 5411-2 of the General Code and separately set forth in such report shall be subtracted from the amount of taxable deposits so assessed and separately assessed in the names of such respective depositors. In the case of an incorporated financial institution all of whose shares constitute deposits as defined in section 5324 of the General Code such assessment of shares shall exclude the capital stock thereof as so shown but shall include the surplus or reserve and undivided profits so shown."

Section 5638-1, General Code

"Annual taxes are hereby levied on the kinds and classes of intangible property, hereinafter enumerated,

> on the intangible property tax list in the office of the Auditor of State and duplicate thereof in the office of Treasurer of State at the following rates, to wit:
>
> "* * * deposits, two mills on the dollar; shares in the capital employed by financial institutions, two mills on the dollar * * *."

The Supreme Court of Ohio in its decision in the instant case applied the language of the quoted statutes to the appellant in the following language, 161 Ohio St., at pages 135-136:

> "Our conclusion is that the words, 'capital employed, or the property representing it, in a financial institution the capital of which is not divided into shares, or which has no capital stock' as found in Section 5408, General Code, the words 'the value of the property representing the capital employed by such financial institution, not divided into shares' as found in Section 5612, General Code, and the words 'capital employed by financial institutions' as found in Section 5638-1, General Code, were intended by the General Assembly in each of those sections to describe the intangible property interests of ownership in a financial institution and not to describe the capital or any of the property of or belonging to such an institution. *It follows that, where a financial institution without capital divided into shares or without capital stock is a corporation, the General Assembly indicated an intent to impose a tax upon the intangible property interests of ownership of the owners of the corporation, and not a tax upon the capital of or any property of or belonging to the corporation.* The Society for Savings is such an incorporated financial institution." (Emphasis supplied)

Appellant now seeks to invoke the jurisdiction of this Court contending that the decision below is in clear violation of precedents long established by this Court in that

it sanctions an assessment against capital invested in obligations of the United States.

2. The Decision of the Supreme Court of Ohio Holding That the Interest of the Owners of the Corporation in the Surplus, Reserves and Undivided Profits Was Subject to Taxation Is Not Contrary to any Precedents Established by This Court

Nothing would be gained by belaboring the clear and well reasoned opinion of Judge Taft which is summarized in the quotation set out above. It is submitted that it clearly demonstrates that the Supreme Court of Ohio sought to tax the ownership interests which individuals have in the surplus and reserves of the appellant bank. Appellant's apparently cannot bring themselves to this realization, and cite to this Court the familiar series of cases beginning with *Weston* v. *Charleston*, 2 Peters, 449, and including the *Bank Tax Cases*, 2 Wall., 200, *Farmer's Bank* v. *Minnesota*, 232 U. S., 516, and the recent case of *New Jersey Title Ins. Co.* v. *Division of Tax Appeals*, 338 U. S., 665. All of these cases stand for the proposition that the states cannot assess ad valorem taxes against obligations of the United States nor against capital which is invested in such obligations.

The Tax Commissioner has no quarrel with those cases. He does contend strongly, however, that they are not precedents which prevent the states from taxing the ownership interests which individuals have in corporations even though those corporations own government obligations. It has been settled since the case of *Van Allen* v. *Assessors*, 3 Wall., 573, that this ownership interest can be taxed when it is represented by a share of stock. It is submitted that the states also have the right to recognize and tax this ownership interest when it is in other forms—in this case an

interest in a mutual savings bank. The cases relied upon by the appellant do not deny such a right to the states.

3. The Appellant Cannot Invoke the Jurisdiction of This Court on the Ground that the Tax Is Improperly Assessed Against it, When it Has Never Attempted, by Appropriate Action Under the State Law, to Reimburse Itself for the Tax Paid

The Tax Commissioner realizes that it is one thing to recognize an ownership interest and to assess a tax against it, and quite another thing to insure that the tax is actually paid by the owner of the interest assessed. When the interest is owned by a shareholder in an ordinary corporation, the problem can be easily solved, and this Court has upheld various state statutes which have required payment by the corporation on account of its stockholders and allowed the corporation to reimburse itself for the tax so paid. *National Bank* v. *Commonwealth*, 9 Wall., 353; *Lionberger* v. *Rouse*, 9 Wall., 468; *Aberdeen Bank* v. *Chehalis County*, 166 U. S. 440; *Merchants Bank* v. *Pennsylvania*, 167 U. S. 461; *Cleveland Trust Co.* v. *Lander*, 184 U. S., 111.

But the appellant here says that the tax has in fact been borne by it, and that it has no right of reimbursement. Therefore, appellant says, the tax is simply an improper assessment against its capital.

It is submitted that this contention of the appellant leaps to its conclusion over several issues of state law which have never been raised, let alone decided against the appellant. It should first be pointed out that the taxes in question were voluntarily paid by appellant for the years 1947 to 1951 and that it now seeks a certificate of abatement on the ground that it never should have paid the tax. *Nowhere in the record does it appear that appellant has ever made*

any attempt to reimburse itself except from the State of Ohio.

Section 5673-2, General Code, in effect during all the times in question, provides as follows:

> "A financial institution so required to pay to the treasurer of state the taxes assessed upon its deposit accounts, as taxable property of its depositors, and or upon its withdrawal shares as taxable property of its shareholders respectively, as provided in the next preceding section, may, upon receipt of notice of the day fixed for the listing of such deposits, charge the amount thereof to and deduct the same from the deposit of each depositor, or from the interest that is due or thereafter becomes due thereon, or from the dividends that are due or thereafter become due thereon, as the case may be, and shall have a lien upon such deposit, interest and or dividends and on all funds in its possession belonging to such depositor or shareholder, or which may at any time come into its possession, for reimbursement of the taxes so payable, with legal interest. Such lien may be enforced in any appropriate manner at any time within six months after the payment of the taxes to the treasurer."

It is true that this statute by its exact language does not confer the right of recoupment upon a mutual savings bank which has paid a tax upon the ownership interests of its depositors. But the Supreme Court of Ohio in clear and unequivocal language has held that those interests are subject to taxation. It does not require great imagination to conceive of that Court's also holding that under the tax laws as so construed a mutual savings bank properly could reimburse itself for the taxes paid by it on account of its depositors. This result might be reached by an interpretation of the statute set out above when read as part of the whole scheme of taxation; or it might be reached under some general principle of law. It seems reasonable to

suppose that the Supreme Court of Ohio would favor an interpretation of the law which would remove any constitutional doubts from its interpretation of the tax law, and which would favor recoupment.

But the appellant does not wish to avail itself of any such remedies. Instead it comes to this Court and asks it to provide an easy tax windfall on the assumption that the courts of Ohio would not allow appellant to reimburse itself from its depositors. It is submitted that this case is not properly presented to this Court until all of these questions of state law have been raised and settled in the state courts.

4. Even if This Case Were Properly Before This Court, the Supreme Court of Ohio, Was Correct in Holding That Because of the Identity Between Appellant and Its Depositors, Payment of the Tax by Appellant Was in Fact Payment by the Ownership Interests Assessed; and in Holding That Appellant Had Obtained Reimbursement from its Depositors.

Even if we assume that the appellant may raise for the first time a question of reimbursement which it has not raised below, the Supreme Court of Ohio correctly decided that point against the appellant.

Under Ohio law, the syllabus of a Supreme Court case is prepared by the Court and represents the law of the case (Section 2503.20, Revised Code). Paragraph 7 of the syllabus of the opinion in this case provides as follows:

> "7. Where all the ownership interests of the owners of a bank are vested in depositors of a single class, such bank may be required by statute to pay a property tax levied on such ownership interests if and when such bank has available for payment of interest to its depositors more than enough to pay the tax so levied."

Here the Ohio court interpreted the Ohio statute so as to require a mutual savings bank to pay the tax in question

only from funds which would otherwise be available for the payment of dividends to depositors. The Court then said that when this has been done, there has been reimbursement of the bank without further proceedings.

The Court based this latter conclusion on that part of its opinion which is set out at pages 136-140 of 161 Ohio State. There the Court discussed the law of mutual savings banks, and emphasized the complete identity of the bank and its depositors. Because of this complete identity—which goes so far as to make the depositors liable to assessment to make up any losses sustained by the enterprise—the Court said that money taken from the interest fund was in fact taken from the depositors in direct ratio to the amount of their deposits. It is submitted that this holding is sound, and disposes of appellant's contention that the tax in question is an assessment against the bank's capital as such.

In light of the above, it is submitted that appellants have failed to raise a debatable Constitutional question which is properly presented to this Court; that they have failed to exhaust remedies available to them under the state law; and that the appeal herein should be dismissed or the order of the Supreme Court of Ohio affirmed.

Respectfully submitted,

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Joseph S. Gill,
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Attorneys for John W. Peck, Tax Commissioner.

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OCTOBER TERM, 1954.

No. 204.

OCIETY FOR SAVINGS IN THE CITY OF CLEVELAND,
Appellant,

vs.

JOHN W. PECK,
Tax Commissioner of Ohio.

ON APPEAL FROM THE SUPREME COURT OF OHIO.

BRIEF FOR APPELLANT.

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In the Supreme Court of the United States

OCTOBER TERM, 1954.

No. 204.

SOCIETY FOR SAVINGS IN THE CITY OF CLEVELAND,
Appellant,

vs.

JOHN W. PECK,
Tax Commissioner of Ohio.

ON APPEAL FROM THE SUPREME COURT OF OHIO.

BRIEF FOR APPELLANT.

OPINIONS BELOW.

The opinion of the Supreme Court of Ohio (R. 30) is reported in 161 O. S. 122, 118 N. E. 2d 651.

JURISDICTION.

The judgment of the Supreme Court of Ohio was entered March 10, 1954. (R. 53.) Application for rehearing was denied March 31, 1954. A petition for allowance of an appeal to this Court was presented to, and granted by, the Chief Justice of the Supreme Court of Ohio on June 3, 1954 (R. 1). On October 14, 1954, this Court noted probable jurisdiction. The statutory provision which sustains the jurisdiction of this Court to review the judgment appealed from is 62 Stat. 929, Sec. 1257(2); U. S. Code, Title 28, Sec. 1257(2).

THE QUESTION PRESENTED.

This case presents the question, whether or not a non-discriminatory property tax assessed by the State of Ohio against an incorporated mutual savings bank, based upon and measured by the bank's net worth (meaning the excess book value of its assets over its liabilities) without deduction of the value of United States government obligations owned by the bank, violates the Borrowing Clause (Art. I, Sec. 8, Cl. 2) and the Supremacy Clause (Art. VI, Cl. 2) of the Constitution of the United States, or Section 3701 of the Revised Statutes of the United States (U. S. Code, Title 31, Sec. 742), by taxing obligations of the United States.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

Article I, Section 8, Clause 2 of the Constitution of the United States provides:

> "The Congress shall have Power * * *
>
> "To borrow Money on the credit of the United States;"

Article VI, Clause 2 of the Constitution of the United States provides:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Section 3701 of the Revised Statutes of the United States (U. S. Code, Title 31, Sec. 742) provides:

"Except as otherwise provided by law, all stocks, bonds, Treasury notes, and other obligations of the United States, shall be exempt from taxation by or under State or municipal or local authority."

The Ohio statutes which impose the tax in question, and constitutionality of which is challenged, are Sections 5408 and 5412 of the Ohio General Code (Page's Ohio General Code, Lifetime Edition, and 1952 Cumulative Supplement; Throckmorton's Ohio Code, 1948 Revision, and 1952 Cumulative Supplement). These statutes provide:

"Sec. 5408: All the shares of the stockholders in a financial institution, located in this state, incorporated or organized under the laws of the state or of the United States, the capital stock of which is divided into shares, excepting such as are defined as 'deposits' in section 5324 of the General Code, and all the shares of the stockholders in an unincorporated financial institution, located in this state, the capital stock of which is divided into shares held by the owners of such financial institution, and the capital employed, or the property representing it, in a financial institution the capital of which is not divded into shares, or which has no capital stock, located in this state, shall be listed and assessed at the book value thereof, and taxed in the manner provided in this chapter."

"Sec. 5412: Upon receiving such report the tax commissioner shall ascertain and assess all the taxable shares of such financial institution, or the value of the property representing the capital employed by such financial institution, not divided into shares, at the aggregate amount of the capital, the surplus or reserve fund and the undivided profits as shown in such report, and the amount of taxable deposits of such institution in each county in which the institution maintained an office or offices for the receipt of deposits. Such amounts shall be assessed in the name of such financial institution excepting that the amounts

of the taxable deposits wholly withdrawn from each such institution within the times mentioned in section 5411-2 of the General Code and separately set forth in such report shall be subtracted from the amount of taxable deposits so assessed and separately assessed in the names of such respective depositors. In the case of an incorporated financial institution all of whose shares constitute deposits as defined in section 5324 of the General Code such assessment of shares shall exclude the capital stock thereof as so shown but shall include the surplus or reserve and undivided profits so shown."

Other pertinent Ohio statutes are set forth in Appendix A, *infra*, pages 28-32.

STATEMENT OF FACTS AND RULINGS BELOW.

The appellant, Society for Savings in the City of Cleveland, is incorporated under the laws of the State of Ohio as a mutual savings bank. It has no permanent capital divided into shares, no capital stock and no shareholders. (R. 6.)

As required by Ohio law, the Society for Savings filed annual tax returns for the years 1947 to 1951, inclusive, stating for each year the book value of its assets, including obligations of the United States owned by it. (R. 6.)

Taxes were assessed, pursuant to Sections 5408 and 5412, Ohio General Code, against the Society for Savings, and paid by it, in the aggregate amount of $126,115.96, computed upon the book value of the "property representing the capital employed by" the bank, measured by its surplus or reserves (it had no undivided profits) as shown in the returns. (R. 4, 7.) If the book value of United States obligations owned by the bank had been excluded from the tax base there would have remained no "capital, surplus or reserve fund and undivided profits" (Section

5412, Ohio General Code), that is to say net worth, subject to tax.

A claim for refund, termed an "Application for certificate of abatement," was duly filed by the bank with the Tax Commissioner of Ohio, claiming that the federal constitution and statute precluded the State from taxing an incorporated mutual savings bank upon its "value of the property representing the capital employed" unless the State excluded from the tax base the value of United States obligations owned by the taxpayer. (R. 3-5.) The Tax Commissioner denied the application. (R. 5.)

Upon appeal, the Board of Tax Appeals of Ohio reversed the order of the Tax Commissioner and directed him to issue a certificate of abatement to the taxpayer. The journal entry of the Board of Tax Appeals (R. 18-30) predicated the action of the Board squarely upon the proposition that the tax was violative of the federal constitution and statute unless the value of United States obligations owned by the taxpayer was excluded from the tax base.

The Tax Commissioner appealed to the Supreme Court of Ohio, which, with one judge dissenting, reversed the decision of the Board of Tax Appeals and affirmed the original order of the Tax Commissioner. (R. 53.) The majority and dissenting opinions of the Supreme Court of Ohio appear in the Record at pages 30 and 48.

The validity of the Ohio tax statutes, Sections 5408 and 5412, Ohio General Code, in the light of the federal constitutional and statutory provisions exempting obligations of the United States from State taxation, has been questioned at every step of these proceedings.

Appeal has been taken by the Society for Savings to the Supreme Court of the United States, which has noted probable jurisdiction. (R. 54.)

SUMMARY OF ARGUMENT.

The principle is well established by the so-called Bank of Commerce line of cases (*Bank of Commerce v. New York City*, 2 Black 620) that a nondiscriminatory State property tax upon capital or surplus (i.e., net worth) of corporations violates the constitutional and statutory immunity of federal bonds and other obligations, if such bonds or obligations are included in the valuation of assets on which the tax is based.

This principle is basically sound, because the federal government must be unhindered in its financial operations, and even a low-rate nondiscriminatory State tax may affect the marketability of federal bonds. If a low rate tax is permitted, the door is open for more burdensome State taxation.

In the present case, an incorporated mutual savings bank has been required by the State of Ohio to pay a property tax of two mills on the dollar upon the book value of its surplus or reserves (i.e., its net worth). The bank is not authorized to reimburse itself from its depositors or from anyone else, for the tax so paid; nor are the depositors or separate property of depositors made liable under any circumstances for payment, or for reimbursement for payment, of the tax.

The rule of *Van Allen v. Assessors*, 3 Wall. 573, distinguishing a tax upon shares of stock as property of stockholders from a tax upon corporate capital, can have no application where a mutual savings bank is the taxpayer. The depositors in a mutual savings bank do not possess a property right or "intangible ownership interest" in the surplus or reserves of the bank which is separate and apart from their rights as depositors or is, in any way, analogous to the property right of stockholders in shares of stock held

by them. Whatever rights depositors may have in the event of a solvent liquidation of a mutual savings bank are not vested while the bank is a going concern, and cannot be valued, bought, sold or realized upon in any way.

The Supreme Court of Ohio has characterized the tax as one upon "intangible ownership interests" (R. 42, 43) belonging to the depositors in a mutual savings bank. However, even in the case of banks having stockholders, it is held that a tax upon the stock, measured by the bank's net worth and payable by the bank, is unconstitutional to the extent that the value of federal obligations owned by the bank is included in the tax base, unless the bank is given a right to recoup the tax paid from its stockholders. *Home Savings Bank v. Des Moines*, 205 U. S. 503.

In the present case the tax burden falls exclusively upon the bank which is the owner of United States obligations, and it necessarily follows that the tax is invalid to the extent that it is based upon value attributed to such securities. *Farmers and Mechanics Savings Bank v. Minnesota*, 232 U. S. 516.

The characterization of the tax, by the Supreme Court of Ohio, as a tax upon "intangible ownership interests" of depositors, is not conclusive. "The descriptive pigeon-hole into which a state court puts a tax is of no moment in determining the constitutional significance of the exaction." *Wisconsin v. J. C. Penney Co.*, 311 U. S. 435, 443.

ARGUMENT.

I.

THE PRINCIPLE THAT A NONDISCRIMINATORY STATE PROPERTY TAX UPON CORPORATE CAPITAL OR SURPLUS VIOLATES THE CONSTITUTIONAL AND STATUTORY IMMUNITY OF FEDERAL OBLIGATIONS, IF THE LATTER ARE INCLUDED IN THE VALUATION OF ASSETS ON WHICH THE TAX IS BASED, IS WELL ESTABLISHED AND BASICALLY SOUND.

A. The tax in question is an ad valorem personal property tax, assessed against and paid by a mutual savings bank, measured by the net worth of the bank, and without any right of the taxpayer to reimbursement from any other party.

In this case the Supreme Court of Ohio has sustained an ad valorem property tax upon the "capital employed or the property representing it" (Ohio General Code, Section 5408, *supra*, page 3) in an incorporated mutual savings bank, even though the value of bonds and other obligations issued by the United States, and owned by the bank, was included in the tax base. The tax was assessed against and paid by the bank, appellant herein. There is nothing in the law of Ohio which (a) imposes tax liability upon depositors or any person other than the bank, or (b) gives the bank a right to reimbursement from any person.

The general system employed by the State of Ohio for taxing banks during the period in question (1947-1951) was as follows:

> (1) TAX ON DEPOSITS. Each bank was required to report annually the amount of its deposits, and to pay a tax of two mills per dollar on the amount thereof (Ohio General Code, Sec. 5406, 5412, 5638-1). Such tax constituted a property tax upon property of the depositors. While the bank was required to pay

the tax, it was explicitly empowered to reimburse itself by deducting the amount paid from the deposits so taxed or the interest or dividends thereon (Ohio General Code, Sec. 5673-1, 5673-2).

(2) Tax on Shares of Stock. Banks having capital divided into shares were required to report annually the value thereof (measured by book value of the banks' capital, surplus and undivided profits) and to pay a tax of two mills per dollar on the amount thereof (Ohio General Code, Sec. 5408, 5412, 5638-1). Such tax constituted a property tax upon property of the shareholders. While the banks were required to pay the tax they were explicitly empowered to reimburse themselves out of dividends, and to secure such reimbursement they were given a lien upon the shares themselves and upon all other funds of the shareholders in the banks' possession (Ohio General Code, Sec. 5672, 5673).

(3) Tax on Capital Employed. Banks having no shares were required to report annually the "capital employed, or the property representing it" in such banks (Ohio General Code, Sec. 5408), measured by the book value of their capital, surplus and undivided profits (Ohio General Code, Sec. 5412); and to pay a property tax of two mills per dollar on the amount thereof (Ohio General Code, Sec. 5638-1). The law made no provisions whereby such banks could reimburse themselves for the tax paid, either by imposing a direct personal liability for the tax, or an indirect liability by way of a right to reimbursement, on anyone other than the banks.

(4) Tax on Real Estate. Real estate of banks was taxed locally, just as other real estate was taxed (Ohio General Code, Sec. 5409).

(5) FRANCHISE TAX. Banks were required to pay an annual franchise tax, upon the same basis as other corporations.

The present litigation is concerned with taxes assessed and paid under the third category. Though having particular reference to the tax years 1947 to 1951, inclusive, the foregoing system has not been changed and continues to represent the mode employed by the State of Ohio for taxing banks.

B. The principle is firmly established that the constitutional and statutory immunity from State taxation of federal obligations precludes a State from exacting a property tax from a corporation measured by its net worth, unless (1) the value of federal obligations owned by the corporation is excluded from the tax base, or (2) the taxpayer is entitled to reimbursement from some third person whose property, separate and distinct from the corporation's property, constitutes the subject matter of the tax.

In the present case the Supreme Court of Ohio did not challenge the basic principle, established by numerous decisions of the Supreme Court of the United States, that a property tax upon a corporation, measured by its net worth, violates the constitutional and statutory immunity of obligations issued by the federal government, if the value of such obligations is included among the assets evaluated in calculating net worth.

That rule, first pronounced in *Bank of Commerce v. New York City*, 2 Black 620 (1863), has been reaffirmed in numerous later cases of which the following are especially notable: *Bank Tax Case*, 2 Wall. 200 (1864); *Home Savings Bank v. Des Moines*, 205 U. S. 503 (1907);

Farmers and Mechanics Savings Bank v. Minnesota, 232 U. S. 516 (1914); *Missouri v. Gehner*, 281 U. S. 313 (1930); *New Jersey Realty Title Ins. Co. v. Division of Tax Appeals*, 338 U. S. 665 (1950).

In *Bank of Commerce v. New York City*, 2 Black 620 (1863), a New York tax upon the capital stock of banks, assessed against the banks themselves and measured by actual value of the stock, was held unconstitutional, when so applied as to include, in the property taxed, value attributable to federal obligations owned by the banks. It was held that the effect of the assessment was to tax obligations of the United States contrary to the decisions in *M'Culloch v. Maryland*, 4 Wh. 316 (1819) and *Weston v. City Council of Charleston*, 2 Peters 449 (1829). The Court expressly recognized (2 Black, at 629) that the New York statute and assessment did not discriminate against obligations issued by the United States.

As a result of the *Bank of Commerce* decision, New York amended its statutes in such manner as to tax banks upon the aggregate amount of their paid-in capital and surplus. In the *Bank Tax Case*, 2 Wall. 200 (1864) this latter tax was held unconstitutional when so applied as to include, in the tax base, the value of federal securities owned by a bank. The Court said (2 Wall. at 208 and 210):

> "* * * It is not easy to separate the property in which the capital is invested from the capital itself. * * * The capital is not an ideal, fictitious, arbitrary sum of money set down in articles of association, but, in the theory and practical operation of the system, is composed of substantial property, and which gives value and solidity to the stock of the institution. * * *
>
> "Having come to the conclusion that the tax on the capital of the Bank of the Commonwealth is a tax on the property of the institution, and which consists

of the stocks of the United States, we do not perceive how the case can be distinguished from that of the Bank of Commerce v. New York City, 2 Black 620, heretofore decided by this court."

In *Missouri v. Gehner*, 281 U. S. 313 (1930) the Court held a Missouri tax upon insurance companies, measured by the net value of their assets, to be invalid. Although federal securities were excluded from gross assets, deductible liabilities were reduced proportionately, and this was held to create, indirectly, a tax burden on the federal obligations. The Court said, at pages 320-321:

> "It is elementary that the bonds or other securities of the United States may not be taxed by state authority. That immunity always has been deemed an attribute of national supremacy and essential to its maintenance. The power of Congress to borrow money on the credit of the United States would be burdened and might be destroyed by state taxation of the means employed for that purpose. As the tax-exempt feature tends to increase and is reflected in the market prices of such securities, a state tax burden thereon would adversely affect the terms upon which money may be borrowed to execute the purposes of the general government. It necessarily follows from the immunity created by federal authority that a State may not subject one to a greater burden upon his taxable property merely because he owns tax-exempt government securities. *Neither ingenuity in calculation nor form of words in state enactments can deprive the owner of the tax exemption established for the benefit of the United States.*" (Emphasis supplied.)

A New Jersey tax upon insurance companies, measured by a fixed percentage of capital and surplus, was held invalid because the value of federal securities was included in the tax base, in *New Jersey Realty Title Ins. Co.*

v. Division of Tax Appeals, 338 U. S. 665 (1950). The Court said, at page 673:

> "It matters not whether the tax is, as appellee contends, an indirect or excise levy on net worth measured by corporate capital and surplus or is, as appellant urges, a tax on personal property based on a valuation gauged by capital and surplus. Our inquiry is narrowed to whether in practical operation and effect the tax is in part upon federal bonds. We can only conclude that the tax authorized by § 5415-22, whether levied against capital and surplus less liabilities or against entire net worth, is imposed on such securities regardless of the accounting label employed in describing it."

Farmers and Mechanics Savings Bank v. Minnesota, 232 U. S. 516 is an authority directly in point, and sustains the position of the appellant in the present case. The question was whether the State of Minnesota, in taxing the net worth of a mutual savings bank, could lawfully include, as part of the tax base, the value of federal securities (bonds issued by municipalities situated in territories of the United States) owned by the bank. Holding that the value of such securities could not be included, the Court said in part (pages 520, 528):

> "* * * Plaintiff in error is a *savings bank, having no capital stock*, and was taxable under No. 839, R. L. (Minn.) 1905, which provides for ascertaining the surplus remaining after deducting from its assets (other than real estate, which is separately assessed), the amount of the deposits and of all other accounts payable; the surplus to be taxed as 'credits.' *The Supreme Court of Minnesota held that this section imposes not a franchise but a property tax, and that the surplus of savings banks as thus determined is taxable property.* * * *
>
> " * * * *

"It is, however, further suggested that the judgment under review does not sustain a tax upon the bonds as property, but only a tax upon the surplus of the Savings Bank, computed by taking into the account all of its assets, amounting to about $12,000,000, of which the bonds were only about $700,000, and deducting therefrom its liabilities. *But as the surplus is treated as property and taxed as such, it is obvious that some portion of the burden of the tax is attributable to the ownership of the municipal bonds.* In Bank of Commerce v. New York City, 2 Black 620, it was held that the State of New York in taxing the capital of banks according to its valuation must leave out of the calculation that portion of the capital invested in the stocks, bonds, or other securities of the United States not liable to taxation by the State. And see Bank Tax Case, 2 Wall. 200; Home Savings Bank v. Des Moines, 205 U. S. 503, 509.

"*It results that the inclusion of the bonds now in question in the list of the assets of plaintiff in error, in ascertaining its surplus for the purpose of imposing a state property tax thereon, was repugnant to the Constitution of the United States.*" (Emphasis supplied.)

Thus, the principle that the constitutional and statutory immunity from State taxation of federal bonds and other obligations is a complete immunity has been recognized many times. The States may not tax such securities even though the tax is not imposed directly on the federal obligations, but is imposed upon the net worth of the corporate taxpayer.

Even nondiscriminatory taxes by the states are objectionable because differences from state to state would tend to affect marketability, and because it would be impossible for the federal government to anticipate changes in the tax laws of the states. Furthermore, an ad valorem tax upon capital always bears with greater weight upon

low interest bearing securities such as bonds issued by the United States, as compared with securities yielding a greater rate of interest. The tax in the present instance is two mills on the dollar of corporate net worth, but if this tax is sustained there will be no legal impediment to State taxation at a much higher rate.

In 1938, the Department of Justice published a survey entitled "Taxation of Government Bondholders and Employees." Although questioning the soundness of several of this Court's decisions respecting other kinds of taxes, it did not take exception to the basic theory of the *Bank of Commerce* line of cases. It stated (pp. 24-25):

> "The Court has many times considered the validity of taxes imposed upon the 'capital' or the 'assets' of corporations. In each of the cases it has held the tax invalid unless provision were made for deducting the value of government bonds held by the corporation. Whatever the measure of taxation which is adopted, if the Court concludes that it is in effect imposed upon the property held by the corporation, the value of its government bonds must be deducted. * * *"

Section 3701 of the Revised Statutes of the United States (U. S. Code, Title 31, Section 742) specifies that, except as otherwise provided by law, all bonds and other obligations of the United States "shall be exempt from taxation by or under State or municipal or local authority." Section 3701 was derived from a series of earlier statutes commencing with the Act of February 25, 1862, 12 Stat. 345, 346. These various statutes are reviewed in a footnote in *Smith v. Davis*, 323 U. S. 111, 117. The clear purpose of these statutes was to confirm the constitutional immunities established by the Supreme Court of the United States in *Weston v. City Council of Charleston*, 2 Peters 449, and other decisions previous to the enactment of the statutes.

II.

A TAX UPON SHARES OF STOCK, AS PROPERTY OF THE STOCKHOLDERS, IS DISTINGUISHABLE FROM A TAX UPON PROPERTY OF THE CORPORATION; BUT THIS DISTINCTION IS MEANINGLESS IN THE CASE OF A TAX UPON AN INCORPORATED MUTUAL SAVINGS BANK, MEASURED BY ITS NET WORTH, WHERE THE BANK ALONE IS LIABLE FOR THE TAX, AND WHERE NO RIGHT OF REIMBURSEMENT IS PROVIDED.

A. This Court has recognized that a State tax upon shares of stock, measured by its book value, may include the value of federal securities owned by the corporation in ascertaining such book value; but this rule is predicated upon the tax being enforceable against the stock or its owners.

That a tax upon shares of stock as property of stockholders is distinguishable from a tax upon corporate capital or surplus, has been settled by decisions of this Court. *Van Allen v. Assessors*, 3 Wall. 573; *Cleveland Trust Co. v. Lander*, 184 U. S. 111; *Des Moines National Bank v. Fairweather*, 263 U. S. 103. Such taxes are held valid, even though based on a valuation which reflects the value of exempt securities owned by the corporation, on the ground that the shareholders' property right in the shares of stock is distinct from the property of the corporation.

B. If a State tax is nominally upon shares of stock, but enforceable only against the corporation, without recourse of the corporation for reimbursement against the stock or stockholders, the value of federal securities owned by the corporation must be excluded from the tax base.

Where a State tax is ostensibly assessed against shares of bank stock, but the bank alone is liable for payment of

the tax, without right of reimbursement against the shareholders, this Court has held that such tax, measured by the bank's capital and surplus without deduction of the value of bonds of the United States owned by the bank, is unconstitutional. *Home Savings Bank v. Des Moines*, 205 U. S. 503.

C. The Ohio Supreme Court's characterization of the tax here involved, as a tax upon the "intangible ownership interest" of depositors in the capital employed in a mutual savings bank, measured by the bank's net worth, does not justify inclusion of federal securities owned by the bank in the calculation of the tax, because the bank alone is subjected to the tax, without recourse against the depositors or against separate property of depositors.

The Ohio Supreme Court sought to distinguish the *Bank of Commerce* line of cases by characterizing the Ohio tax in question as a tax, not upon the property of the bank, but upon an "intangible ownership interest" of the depositors in the net worth of the bank, the argument being that, because depositors are the only persons who might have any beneficial interest in the net worth of a mutual savings bank, it may be said that the tax is against such beneficial interest. At the same time, the Ohio Supreme Court sought to distinguish *Home Savings Bank v. Des Moines*, 205 U. S. 503, and *Farmers and Mechanics Savings Bank v. Minnesota*, 232 U. S. 516, from the present case, on the theory that here the corporation possessed the equivalent of a "right of reimbursement" because the equity of the depositors, i.e., the value of their "intangible property interest" in the bank was reduced by the amount of the tax paid. The reasoning of the Ohio Supreme Court is expressed as follows (R. 42):

"In Sections 5672 and 5673, General Code, provisions are made to insure reimbursement from its shareholders by a financial institution on account of taxes paid by it which were assessed on its nonwithdrawable shares. Likewise provisions to insure reimbursement on account of payment by a financial institution of taxes assessed upon its deposits as taxable property of its depositors and its withdrawable shares as taxable property of its shareholders are made in Sections 5673-1 and 5673-2, General Code. *However, it is arguable that, unless these latter two sections are given a broader construction than their words appear to justify, there is no specific statutory provision which would enable an incorporated financial institution, the capital stock of which is not divided into shares or which has no capital stock, to secure reimbursement from those who are or may be owners of the intangible property representing the capital employed by such owners in the corporation. In our opinion, such a provision is not necessary to enable such a financial institution to secure such reimbursement.* * * *

"With respect to that species of intangible property which represents the ownership interests in a corporation, the capital of which is not divided into shares or which has no capital stock, payment by the financial institution of the tax will always in effect amount to payment by those who are the beneficial owners of such intangible property. Such payment will necessarily reduce the amount, which the corporation will have available for payment of interest to depositors or holders of withdrawable shares and which will be available for protection of their deposits or stock claims and for distribution to them in the event of liquidation of the corporation. Thus, the financial institution, which pays the tax on their property interests in the corporation, will always be able to reimburse itself by reducing the ultimate value of the property interests of those who are the only ones who

> can have any claim to benefit from the ownership interests taxed." (Emphasis supplied.)

Assuming, arguendo, that the construction of Sections 5408 and 5412, Ohio General Code, as determined by the Ohio Supreme Court, is correct, and the tax is a tax upon "intangible ownership interests" of the depositors in the net worth of a mutual savings bank, nevertheless the fact remains that the tax is assessed against and is paid by the bank. The tax falls, both initially and ultimately upon the corporation, because there is no provision of law whereby it can be recovered by the corporation from the depositors personally or out of property of the depositors. The depositors are not personally liable for the tax, either primarily or otherwise. The tax is and remains, therefore, a burden upon ownership of federal securities by the corporation. That the depositors' *equity* in the corporation is diminished proportionately as the net worth of the corporation is reduced, by payment of the tax, does not result in *reimbursement* of the taxpayer corporation; its net worth remains diminished without possibility of restoration by reimbursement. "In paying the tax the corporation has paid its own debt and not that of others, and there is nothing in such payment from which the law can imply a promise of reimbursement." *Home Savings Bank v. Des Moines*, 205 U. S. 503, 511.

Furthermore, as pointed out in the dissenting opinion of Judge Stewart of the Supreme Court of Ohio in the present case, the argument based upon the theory that the equity of depositors in a mutual savings bank is automatically reduced by the tax would apply with equal force to the equity of stockholders in a financial institution that issued stock. Judge Stewart commented as follows (R. 50):

"Admitting that there is no way for the institution to obtain reimbursement from such depositors for the tax paid on the assets, yet it is said that the depositors really pay it because the tax creates a decrease in the assets of the institution in which they have intangible rights. It would not be contended that a tax could be assessed against the capital, surplus, reserve fund, and undivided profits of a bank with shares, without deducting any federal securities from the property assessed, and yet the same argument could be made to the effect that such a tax was against the shareholders because it would decrease the amount of assets in the bank, which they, as shareholders, own."

In substance, if the judgment of the Supreme Court of Ohio in the present case is to stand, a device has been found by which a long line of decisions of the Supreme Court of the United States, commencing with *Bank of Commerce v. New York City*, 2 Black 620 (1863), and including the recent case of *New Jersey Realty Title Ins. Co. v. Division of Tax Appeals*, 338 U. S. 665 (1950), may be set at nought. A state legislature, or the courts of a State, in order to sustain a tax upon federal securities as part of the net worth of a corporation, have merely to characterize the tax as being a tax upon property of those to whom the equity in the corporate net worth would belong in the event the corporation were dissolved, be they stockholders or others, and the tax assessed against and payable by the corporation would then be unassailable.

In distinguishing *Home Savings Bank v. Des Moines*, 205 U. S. 503, and *Farmers and Mechanics Savings Bank v. Minnesota*, 232 U. S. 516, from the present case, the Supreme Court of Ohio asserted that in those cases the taxes were assessed upon property of the banks, whereas

in the present case the tax is upon property of the depositors. Such a distinction, however, is without significance if the bank is required to pay the tax, with no right of reimbursement against the depositors, and if the so-called "intangible ownership interest" of the depositors is merely their equity in the net worth of the bank, which is automatically reduced in value by the bank's payment of the tax.

In *Home Savings Bank v. Des Moines*, 205 U. S. 503, the State taxed banks upon the value of their capital stock, measured by net worth less the value of real estate owned. The tax was assessed against the banks and not against individual stockholders, and no provision was made for reimbursement out of separate property of the stockholders. The Supreme Court of the United States held that the tax was void to the extent that it included the value of federal obligations owned by a bank in the tax base. In answer to the argument of the State, that the tax was on property of the stockholders because they owned the stock nominally taxed and because the tax exacted of the bank operated to reduce the equity of the stockholders, this Court spoke as follows (205 U. S. 503, at 511 and 519):

> "* * * The law imposes no obligation on the shareholder. In paying the tax the corporation has paid its own debt, and not that of others, and there is nothing in such a payment from which the law can imply a promise of reimbursement. These taxes, therefore, are not to be paid by the banks as agents of their stockholders, but as their own debt, and unless it is supposed that the law requires them to pay taxes upon property which they do not own, the taxes must be regarded as taxes upon the property of the banks. The fair interpretation of the law is that the taxes are upon the property of the banks. * * *"

"One other consideration only needs to be noticed. It is said that where a tax is levied upon a corporation measured by the value of the shares in it, it is equivalent in its effect to a tax (clearly valid) upon the shareholders in respect of their shares, because, being paid by the bank, the burden falls eventually upon the shareholders in proportion to their holdings. It was upon this view that the lower court rested its opinion. But the two kinds of taxes are not equivalent in law, because the State has the power to levy one and has not the power to levy the other. The question here is one of power and not of economics. If the State has not the power to levy this tax, we will not inquire whether another tax which it might lawfully impose would have the same ultimate incidence. * * *"

Thus, the precise argument advanced in the majority opinion of the Supreme Court of Ohio, in the present case, was refuted by the Supreme Court of the United States in the case of *Home Savings Bank v. Des Moines*, 205 U. S. 503. If a tax is exacted of a banking corporation, measured by its net worth, and value of federal obligations owned by the corporation is included in the computation of net worth, the tax is necessarily a burden upon the federal obligations, and it is immaterial whether the net worth is regarded as property of the corporation or property of its stockholders or depositors.

The economic burden theory advanced by the Ohio Supreme Court breaks down when examined from another standpoint. According to the theory, the depositors of a mutual savings bank own the bank; hence a property tax upon the net worth of the bank is in reality a tax upon the depositors, and the separate corporate entity of the bank may be disregarded for purposes of adjudging the constitutional validity of the tax. If, however, the corpo-

rate entity is to be disregarded for the purpose of ascertaining who ultimately pays the tax, it should with equal logic be disregarded in ascertaining who ultimately owns the United States bonds value of which is included in the tax base. The full circle is completed, and again the tax is a burden upon ownership of federal securities.

D. The theory of the Ohio Supreme Court, treating the tax as imposed upon property of depositors, is artificial and unsound.

The artificiality of the theory advanced by the Supreme Court of Ohio for sustaining the validity of the tax in this case is made apparent when the position of a depositor, as respects the surplus and reserves of an incorporated mutual savings bank, is considered. The depositor does not own the property comprising the assets of the bank. So long as the bank is a going concern his "ownership interest" is limited to his deposits and distributions of earnings with respect thereto which may be authorized by the bank's board of trustees. The relationship between the depositor and the bank, as respects his deposit, is that of creditor and debtor. The bank may terminate the relationship at any time by paying out the balance of the deposit, and nothing more, to the depositor. The depositor has no interest or property right, which can be bought, sold or dealt with in any way, separate and apart from his deposit. The value of his interest can never rise above his deposit. The surplus of the bank is accumulated and held solely to insure the depositors against loss of their deposits. The depositors have no interest in the surplus and reserves of the bank by which they can compel distribution.

When a depositor withdraws his deposit, any possible interest that he may have in the bank's surplus is termi-

nated without any payment in respect thereto. When a new account is opened, the new depositor has all the protection provided by the bank's existing surplus, in common with other depositors, without payment therefor. The Ohio law is silent as to what disposition is to be made of the surplus in the event of liquidation of a solvent mutual savings bank. While it may be presumed that in such event the surplus would be distributed in some fashion among existing or former depositors, the method for determining the persons, and the formula for determining the proportion of the surplus to be distributed to each is unknown and presently undeterminable. Certain it is that the right, if any, to share in such surplus is not vested, and cannot be regarded as an existing property right to which value can be ascribed. To the extent that an "intangible ownership interest" exists, it is an inseparable and indivisible part of the deposit. The deposit is already otherwise taxed. If depositors were actually taxed upon their supposed "intangible ownership interest" in the bank's surplus and reserves, a constitutional question would be presented whether a tax could be exacted upon a nominal property interest which is not property of the taxpayer in any real sense because he can neither sell it nor transfer it in any way and it has no realizable value to him whatever.

The Supreme Court of Ohio attempted to gloss over the absurdity of its theory by pointing out a supposed analogy to the taxability of shares of stock, arguing that the book value of shares of stock does not necessarily reflect market value (R. 45).

Shares of stock, however, are subject to the dominion of their owner, and their market value is not wholly unrelated to book value. Whatever the value of the shares, it passes by transfer of the shares. In contrast, depositors

in a mutual savings bank possess nothing that they can transfer, or sell, over and above or separate from the bank's indebtedness represented by the amount of their deposits. The related property interests of bank and depositors are well stated in *Collett v. Springfield Savings Society*, 13 Ohio Circuit Court Reports 131, 7 Ohio Circuit Decisions 146 (1896), affirmed without opinion, 56 O. S. 776. (13 O. C. C. at 143-144):

> "* * * By reason of the peculiar character of such a society, the value of a depositor's interest, so long as the society continues doing business, can never rise above par, and, therefore, for purposes of taxation, does not represent the furniture, real estate, surplus, and undivided profits.
>
> "This is so because the depositor has no occasion to sell his interest, the law providing that he may withdraw his deposit, and no one would give a depositor more than par because on depositing an equal amount the law gives such person an interest just as valuable. The real estate and furniture are for the purpose of transacting the business of the society, and the latter depositors would receive from them and from the surplus just as much benefit as the former. The surplus, the law provides, is to be accumulated and held to insure the depositors against loss from a depreciation of investments, and it adds no more to the taxable value of a depositor's 'property' in the society than does other insurance to the taxable value of the property it covers."

The language quoted was perhaps dictum in the context in which it was said. Nevertheless it correctly states the position of depositors in mutual savings banks.

III.

THE CHARACTERIZATION OF THE TAX BY THE SUPREME COURT OF OHIO, AS A TAX UPON PROPERTY OF DEPOSITORS, IS NOT CONCLUSIVE IN DETERMINING THE REAL NATURE OF THE TAX AND ITS EFFECT UPON THE FEDERAL RIGHT ASSERTED.

The characterization by the Ohio Supreme Court of the tax now under review, as a tax upon "intangible ownership interests" of the depositors in an incorporated mutual savings bank (despite the fact that the bank alone is liable for payment of the tax, without right of reimbursement), is not conclusive upon this Court. Where a federal right is concerned the Supreme Court of the United States is not bound by the characterization given to a state tax by state courts or legislatures. A long line of judicial construction establishes the principle that the duty rests upon this Court to decide for itself facts or constructions upon which federal constitutional issues rest. *Kern-Limerick, Inc. v. Scurlock*, 347 U. S. 110, 121; *New Jersey Realty Title Ins. Co. v. Div'n of Tax Appeals*, 338 U. S. 665, 674; *Richfield Oil Corp. v. State Board*, 329 U. S. 69, 84; *United States v. County of Allegheny*, 322 U. S. 174, 184; *Wisconsin v. J. C. Penny Co.*, 311 U. S. 435, 443; *Senior v. Braden*, 295 U. S. 422, 429.

CONCLUSION.

The judgment of the Supreme Court of Ohio should be reversed and the cause remanded for the purpose of restoring to appellant, pursuant to Ohio law, the excessive tax collected.

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Dated: January 31, 1955.

APPENDIX A.

Provisions of the Ohio General Code, additional to those quoted on pages 3-4 of this brief, and pertinent to be considered therewith, are set forth below.

Section 5324:

"The term, 'deposits' as so used, includes every deposit which the person owning, holding in trust, or having the beneficial interest therein is entitled to withdraw in money, whether on demand or not, and whether evidenced by commercial or checking account, certificate of deposit, savings account or certificates of running or other withdrawable stock, or otherwise, excepting (1) unearned premiums and surrender values under policies of insurance, and (2) such deposits in financial institutions outside of this state as yield annual income by way of interest or dividends in excess of four per centum of the principal sum so withdrawable."

Section 5406:

"The deposits required to be returned by financial institutions pursuant to this chapter include all deposits as defined by section 5324 of the General Code to the extent that such deposits are made taxable by section 5328-1 of the General Code, excepting deposits belonging to the federal government or any instrumentality thereof; or deposits to the extent of advances or advance payments made under any contract entered into by the federal government or any instrumentality thereof for the production of materials or supplies or the furnishing of services pursuant to authority of any act to further the war effort; or deposits belonging to the state of Ohio or any county, municipal corporation, school district, township, or other subdivision thereof, or to any other financial institution, or to a dealer in intangibles or a domestic insurance company, or to an institution used exclusively for charitable purposes, or proceeds

of loans which have been credited to the borrower but not disbursed, or advances by borrowers for the subsequent payment of specific obligations. If any deposit belonging to any of the classes required so to be returned consists in whole or in part of an amount representing uncollected checks and other uncollected items, credited thereto, one-half of the amount so represented shall be considered as withdrawable and to be so included in arriving at the aggregate balance of taxable deposits, required so to be returned, whether or not the depositor is in fact permitted to make withdrawals against the amount so represented and credited."

Section 5409:

"The real estate of a financial institution shall be taxed in the place where it is located, in like manner as the real estate of persons is taxed; but the tax provided for in this chapter shall be in lieu of all other taxes on the other property and assets of such institution."

Section 5411:

"The cashier or other principal accounting officer of each incorporated bank, the secretary or other principal accounting officer of each other incorporated financial institution, the cashier, manager or owner of each unincorporated bank, and the manager, owner or owners of each other unincorporated financial institution, shall return to the department of taxation between the first and second Mondays of March, annually, a report exhibiting in detail, and under appropriate heads, the resources and liabilities of such institution at the close of business on the thirty-first day of December next preceding."

Section 5411-1:

"On or before the fifth day of December annually, the tax commission of Ohio shall fix the day as of which the taxable deposits in financial institutions

shall be listed and assessed. The day so fixed shall be between the first and the thirtieth days of November both inclusive and the action of the commission shall be taken not more than five days after the day so fixed. Notice of such action shall be immediately given to each financial institution and to the auditor of each county by registered mail, and the date so fixed shall be printed or stamped on the forms of return to be made by all financial institutions. The dates herein fixed for the action of the commission are directory merely, and if through inadvertence or mistake such action is not taken at the time herein prescribed, or the notice herein required to be given to a financial institution or a county auditor is not duly given, the remaining requirements of this chapter and the validity of any assessment made hereunder shall not be affected thereby."

Section 5411-2:

"The report of each financial institution made pursuant to section 5411 of the General Code shall also show the aggregate balances of the taxable deposits of its depositors, in each county in which the institution maintained an office or offices for the receipt of deposits, at the end of business on the day fixed by the board of tax appeals pursuant to section 5411-1 of the General Code. The report shall show also the names and addresses of all depositors whose deposits were wholly withdrawn from such institution between the day so fixed and the date on which notice of the fixing thereof was received by such institution, or if no such notice was received, then between the day so fixed and the first day of January next following, and the amount of the taxable deposits of each such depositor on the day so fixed.'

Section 5638-1:

"Annual taxes are hereby levied on the kinds and classes of intangible property, hereinafter enumer-

ated, on the intangible property tax list in the office of the auditor of state and duplicate thereof in the office of treasurer of state at the following rates, to wit:

"* * * deposits, two mills on the dollar; shares in and capital employed by financial institutions, two mills on the dollar; * * *."

Section 5672:

"Taxes assessed on non-withdrawable shares of stock, of a financial institution, shall be a lien on such shares from the first day of January in each year until they are paid.

"It shall be the duty of every financial institution to collect the taxes due upon its shares of stock from the several owners of such shares, and to pay the same to the treasurer of state and any financial institution failing to pay the said taxes as herein provided, shall be liable by way of penalty for the gross amount of the taxes due from all the owners of the shares of stock, and for an additional amount of one hundred dollars for every day of delay in the payment of said taxes."

Section 5673:

"Such financial institution paying to the treasurer of state the taxes assessed upon its shares, in the hands of its shareholders respectively, as provided in the next preceding section, may deduct the amount thereof from dividends that are due or thereafter become due on such shares, and shall have a lien upon the shares of stock and on all funds in its possession belonging to such shareholders, or which may at any time come into its possession, for reimbursement of the taxes so paid on account of the several shareholders, with legal interest; and such lien may be enforced in any appropriate manner."

Section 5673-1:

"Taxes assessed on deposits in a financial institution in this state shall be a lien on the deposit of each person as of the day fixed by the tax commission of Ohio for the listing of such deposits. Taxes assessed on the shares of stock of such an institution, all of whose shares are withdrawable and defined as deposits in chapter four of this title, shall be a lien on such shares so defined as deposits as of the day so fixed. It shall be the duty of every financial institution to pay the taxes on the amount of such deposits and/or withdrawable shares assessed in its name to the treasurer of state and any such institution failing to pay such taxes as herein provided shall be liable by way of penalty for the gross amount of the taxes due on and with respect to all its deposits and withdrawable shares assessed in its name and for an additional amount of one hundred dollars for every day of delay in the payment of such taxes."

Section 5673-2:

"A financial institution so required to pay to the treasurer of state the taxes assessed upon its deposit accounts, as taxable property of its depositors, and/or upon its withdrawable shares as taxable property of its shareholders respectively, as provided in the next preceding section, may, upon receipt of notice of the day fixed for the listing of such deposits, charge the amount thereof to and deduct the same from the deposit of each depositor, or from the interest that is due or thereafter becomes due thereon, or from the dividends that are due or thereafter become due thereon, as the case may be, and shall have a lien upon such deposit, interest and/or dividends and on all funds in its possession belonging to such depositor or shareholder or which may at any time come into its possession, for reimbursement of the taxes so payable, with legal interest. Such lien may be enforced in any appropriate manner at any time within six months after the payment of the taxes to the treasurer."

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 204

SOCIETY FOR SAVINGS IN THE CITY OF CLEVELAND,

Appellant,

v.

JOHN W. PECK, TAX COMMISSIONER OF OHIO

APPEAL FROM THE SUPREME COURT OF OHIO

REPLY BRIEF IN SUPPORT OF JURISDICTION

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REPLY BRIEF IN SUPPORT OF JURISDICTION

Appellee contends that a tax against the bank, on a base which includes its United States securities, is valid, because it is a tax against property of depositors, not against property of the bank.

Confronted by the fact that in the tax on shareholders on their shares of stocks, a bank is carefully given by statute, a right to reimburse itself from the shareholder, and that there is no such statute covering the tax here in question, appellee can only say that it does not require "great imagination to conceive of that Court's (the Ohio Supreme)" holding that a bank could have a right of reimbursement.

This question of reimbursement was argued at length by both sides in the Ohio Supreme Court. That Court made no claim that there was such a right to recover this tax from depositors. Instead the Court relied upon the very different argument that

> "Payment by the financial institution of the tax will always in effect amount to payment by those who are

> the beneficial owners of such intangible property. Such payment will necessarily reduce the amount which the corporation will have available for payment of interest to depositors or shareholders of withdrawable shares and which will be available for protection of their deposits or stock claims and for distribution to them in the event of liquidation of the corporation."

This latter argument was made to this Court in the case of *Home Savings Bank* v. *Des Moines*, 205 U. S. 503. In that case, the tax was expressly on shares of stock issued by a bank.

> "Shares of stock of state and savings banks and loan and trust companies shall be assessed to such banks and loan and trust companies and not to individual shareholders."

The argument there was that, since the tax was on the shares owned by the shareholders, it was not a tax on the property of the bank but a tax on the shareholders; and that the bank could be compelled to pay such a tax because the value of the shares was reduced by the payment out of the bank's assets. This Court refused to accept that argument and held the tax invalid. It pointed out in its opinion (page 520), that such an argument would apply equally to all of the property taxes, which the states had attempted to compel banks to pay, and which this Court had held invalid.

Since this is true as to a tax levied against shares of stock in a bank, which are clearly property of the shareholder, how much more is it true in the instant case, where, we submit, there is no property or ownership in the depositor?

Here, as in the *Des Moines* case, the tax is levied against the bank and is to be paid by the bank.

By the reasoning employed by this Court in the *Des Moines* case, this tax is not one against owners of the bank, of which the bank is merely the collector; it is a tax against

the bank and therefore invalid. But there is an added reason why the facts in the instant case are even stronger than those in the *Des Moines* case. In that case, shares of stock did exist and were owned by the shareholders. Shares of stock are property. But in the instant case, we submit, there is no property in the depositors, other than their "deposits" to be taxed. Beyond their deposits, what do the depositors own? It is said that the bank's surplus gives them a margin of safety, a protection of their deposits against losses by the bank. This is true, and that is the reason why the Ohio statutes provide for the building up of surplus. But this protection is a benefit; to be benefited or protected is a different thing from ownership. In banks which have capital and shares and shareholders, the building up of surplus and undivided profits is a protection to the depositors, against possible future losses by the bank, just as it is in our instant case. The depositors benefit by the protection, but they do not own the property of the bank.

If a bank with capital and shareholders makes large profits on its loans and investments, it can afford to pay higher interest rates, to attract more deposits. So in a mutual savings bank, larger profits may make it possible to offer higher interest rates. But in neither case does this possibility give to the depositors of either the bank with share-capital or the savings bank, any property right or ownership in the property of the bank. Here again a beneficial result is not to be confused with ownership.

Appellant says in Part 4 of his brief that the depositors are so much identical with the bank that they are "liable to assessments to make up any losses sustained by the enterprise". May we point out that there is no basis whatever in any Ohio statute or decision for the assertion that depositors could be so assessed. Depositors are the creditors of the bank. It would seem absurd that they should be assessed in order to pay the assessment back to themselves.

These depositors have not, under the Ohio statutes involved, the slightest power or control over the bank. They have no votes; they are not "members". The only thing which they may possibly possess, different from the rights of a depositor in a share-capital bank, is the purely theoretical possibility, utterly remote in fact, that if the bank should be liquidated at some day in the unknown future, and if there should then be left any surplus after the completion of liquidation, then any such surplus might then be divided among depositors in proportion to their deposits.

But even this theoretical and improbable chance does not amount to a property right in that surplus, in today's depositor. If today's depositor draws out his deposit, as do 20,000 depositors every year, (Rec. p. 14), he ceases to be a depositor and ceases to have even a theoretical interest in the possible distribution of a surplus. If tomorrow, or 10 years from tomorrow, anyone opens a new deposit, he then becomes one of those to whom any surplus would be distributed, if ever there were a liquidation and there were any surplus left.

To say that a depositor is the owner of a fractional part of the property of the bank, so that he can be taxed on this ownership, as a property right, in the same way that the owner of a share of stock in a corporation can be taxed, is to disregard reality. We believe that this Court, in protecting the credit of the United States from inroads by the states, looks to substance.

This Court said in the *Des Moines* case:

> "All its (the law's) parts must be considered in the matter pursued by this Court in *New Orleans v. Huston* and *Home Insurance Company v. New York* with the view of determining the end accomplished by the taxation, and its actual and substantial purpose and effect."

Appellee's brief says that appellant is asking this Court "to provide an easy tax windfall". We submit that the constitutional right that federal securities shall not be taxed by a state, is not an easy tax windfall and is not a windfall at all. The freedom of federal securities from taxation has been repeatedly held to be for the benefit of the federal government, not for the purchaser of the securities. It is vital to the credit of the United States, and to enable the United States to borrow money at low rates. The last sentence in the opinion in the *Des Moines* case is in point (page 521):

> "If by the simple device of adopting the value of corporation shares as the measure of the taxation of the property of the corporation, that property loses the immunities which the supreme law gives to it, then national securities may easily be taxed, whenever they are owned by a corporation, and the national credit has no defense against a serious wound."

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IN THE

Supreme Court of the United States

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vs.

JOHN W. PECK, TAX COMMISSIONER OF OHIO,

Appellee.

BRIEF FOR APPELLEE.

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BRIEF FOR APPELLEE.

THE QUESTION PRESENTED.

This case presents the question of whether a property tax levied by the state of Ohio against the ownership interests of the depositors in an incorporated mutual savings bank and measured by the value of the bank's surplus, reserves and undivided profits violates Article I, Section 8, Clause 2 or Article VI, Clause 2 of the Constitution of the United

States, or Section 3701, Revised Statutes (U.S.C. Title 31, Section 742), by taxing obligations of the United States.

STATEMENT OF FACTS.

The statement of facts in appellant's brief is accurate. In addition thereto it should be pointed out that the Ohio Statutes (Sections 5411-1, 5411-2, 5412, General Code) levy a tax against deposits in financial institutions. Such taxes, like the taxes on the ownership interests here in question, are assessed in the name of the financial institution. Deposit taxes were assessed against appellant for the years in question, were paid by it, and were expressly excluded from its application for refund. (R., 4; appellant's brief, p. 8.)

SUMMARY OF ARGUMENT.

The Supreme Court of Ohio held that the depositors in a mutual savings bank are the owners of the bank's surplus and reserves, and that such ownership represents a distinct taxable interest in property. It also held that when such a bank has accumulated from earnings a fund for distribution to its depositors, that fund is liable to assessment of a state tax levied on the ownership interests of the depositors, without regard to any federal securities held by the bank.

It is the contention of the Tax Commissioner that the Supreme Court of Ohio was correct for the following reasons:

1. A state is authorized to determine its own property law and to assess taxes against those forms of property which it chooses to tax.

2. The rule of *Van Allen v. Assessors*, 3 Wall., 573, permits a state to assess property taxes against the owners of interests in corporations at their full value regardless of any federal securities owned by the corporations.

3. Since the depositors in a mutual savings bank have a vested right to a distribution of the earnings on their deposits, any fund of such earnings which becomes available for distribution to the depositors can be made liable for the payment of property taxes levied against their ownership interests.

The Tax Commissioner also contends that the appellant bank cannot properly raise in this court the question of its right to reimburse itself from its depositors for taxes allegedly paid in their behalf, since no effort has been made by the bank to reimburse itself.

ARGUMENT.

I.

The Supreme Court of Ohio Interpreted the Tax in Question as a Tax Imposed Upon the Intangible Property Interests of Ownership of the Owners of the Corporation and Not as a Tax upon the Capital of or any Property Belonging to the Corporation. Hence, the Principle of the Bank Tax Case, 2 Wall., 200, Does not Apply Here.

Despite appellant's attempt to assert a contrary argument, the tax in question was *not* levied against any property of the bank. The Supreme Court of Ohio interpreted the taxing statutes as follows (161 Ohio St., 122 at 135-136; R., 41-42):

> "Our conclusion is that the words, 'capital employed, or the property representing it, in a financial institution the capital of which is not divided into shares, or which has no capital stock' as found in Section 5408, General Code, the words 'the value of the property representing the capital employed by such financial institution, not divided into shares' as found in Section 5412, General Code, and the words 'capital employed by financial institutions' as found in Section 5638-1, General Code, were intended by the General Assembly in each of those sections to describe the intangible property interests of ownership in a financial institution and not to describe the capital or any of the property of or belonging to such an institution. *It follows that, where a financial institution without capital divided into shares or without capital stock is a corporation, the General Assembly indicated an intent to impose a tax upon the intangible property interests of ownership of the owners of the corporation, and not a tax upon the capital of or any property of or belonging to the corporation.* The Society for Savings is such an incorporated financial institution." (Emphasis supplied.)

This same thought was carried into branches 8 and 9 of the syllabus (R., 31) which in Ohio represents the law of the case.

Because of this clear holding, the line of cases founded upon *Bank of Commerce v. New York City*, 2 Black, 620, and the *Bank Tax Case*, 2 Wall., 200, and discussed by appellant at pp. 10-13 of its brief are not applicable here. Nor is the case of *Farmers and Mechanics Savings Bank v. Minnesota*, 232 U. S., 516, applicable. Although that case involved a savings bank having no capital stock, it was specifically held by the state Supreme Court that the tax in question was levied against the surplus of *the bank*. (232 U. S., at 521.)

So the situation actually presented here is a unique one in which a state, for the first time, has recognized and purported to tax the ownership interests in a mutual savings bank.

II.

When a Tax is Levied Against the Ownership Interests of the Owners of a Corporation, it is Valid Without Regard to Federal Securities Held by the Corporation. That Principle, Based Upon Van Allen v. Assessors, 3 Wall., 573, is Applicable Here.

While a state may not levy a property tax on federal securities or on the capital of a corporation invested in such securities, it has been settled since the case of *Van Allen v. Assessors*, 3 Wall., 573, that a state may levy such a tax against the ownership interests of the owners of a corporation, even though all of the corporation's assets are federal securities. Other cases following this principle, and set out by Judge Taft in his opinion below are *National Bank*

v. Commonwealth, 9 Wall., 353, *Aberdeen Bank v. Chehalis County*, 166 U. S., 440, *Cleveland Trust Co. v. Lander*, 184 U. S., 111, and *Des Moines National Bank v. Fairweather, Mayor*, 263 U. S., 103.

It is the contention of the Tax Commissioner that the principle of the *Van Allen* case is applicable here. It is his contention that the primary consideration in a case of this sort is the property interest upon which the incidence of the tax falls. The state may recognize and tax a valid ownership interest in an ordinary corporation represented by a share of stock. It is the Tax Commissioner's contention that it may also recognize and tax such an interest in a mutual savings bank.

The appellant recognizes the principle of the *Van Allen* case but contends that it does not apply here for the reason that "the depositors in a mutual savings bank do not possess a property right * * * in the surplus or reserves of the bank * * * analogous to the property rights of stockholders." Furthermore, the appellant contends that since it cannot reimburse itself for the tax in question in the same manner as a corporation may reimburse itself from its shareholders, the tax must therefore fall as being improperly assessed against it. Those are questions which this Court must decide.

III.

The Appellant Cannot Contend in this Court that the Tax in Question is Improperly Assessed Against it, When it has Never Attempted, by Appropriate Action Under the State Law, to Reimburse Itself for the Tax Paid.

The appellant's whole case is built upon the contention that it cannot reimburse itself for the tax paid from the owners of the interests assessed, and that the tax must therefore fall as one assessed against appellant's own capital. But at the threshhold of this argument appellant is met by an obstacle which it has not attempted to gainsay: namely, that the appellant paid the tax in question voluntarily and has never attempted to reimburse itself from anyone except the state of Ohio.

Sections 5672, 5673, 5673-1 and 5673-2, General Code, are set out in the appendix to appellant's brief, and are referred to in Judge Taft's opinion (R., 42). They set out a statutory scheme whereby financial institutions may reimburse themselves on account of payment of taxes assessed upon deposits as taxable property of depositors and upon shares as taxable property of shareholders. It is true that they do not in so many words set out a statutory provision for reimbursement which specifically covers this case. But that is not the only thing to be considered.

No opportunity has ever been given the courts of Ohio to consider the question of reimbursement to appellant as it fits into the whole scheme of taxation. Until this case arose, the Supreme Court of Ohio had never spelled out the system of taxation of financial institutions in Ohio which taxed the ownership interests in banks like the appellant. It is not inconceivable that if called upon to do so, that

court would also hold that the right of reimbursement existed in favor of appellant against its depositors. The Ohio court might reach such a conclusion by its interpretation of the general scheme of taxation, "or under the general principle of law that one who pays the debt of another at his request can recover the amount from him." (See: *Home Savings Bank v. Des Moines*, 205 U. S., 503 at 518.)

Certain it is that state courts tend to interpret their own laws so as to assure their validity under the federal constitution. But appellant comes to this court contending that the Ohio law has only one construction—and that an unconstitutional one—although it has never asked the Ohio courts to construe their own state law. It is submitted that that is not a sound position for appellant to assume here, and that its appeal must be dismissed for the reason that it has not attempted to avail itself of its remedies under the state law.

IV.

Even if This Case Were Properly Before This Court, the Supreme Court of Ohio Was Correct in Holding That the Tax Was Paid by the Ownership Interests Assessed, and in Holding That No Reimbursement of the Corporation is Required in This Case.

A. The Depositors Do Have Separate Property Rights in the Surplus and Reserves of the Appellant.

Assuming that the appellant may now raise in this court the question of reimbursement which it did not raise below, we are brought to an argument upon which the appellant places great reliance: namely, that the taxation of ownership interests in the appellant is artificial and unsound. Appellant bases this argument upon the assertion that there are in fact no recognizable property interests subject to

taxation and that this is really just a disguised tax against the bank. At pp. 23-34 of its brief it makes such statements as: "The depositor does not own the property comprising the assets of the bank"; "his 'ownership interest' is limited to his deposits and distributions of earnings * * * which may be authorized by the * * * trustees"; "The depositor has no interest or property right * * * separate and apart from his deposit"; "The depositors have no interest * * * by which they can compel distribution;" "When a depositor withdraws his deposit, any possible interest that he might have in the bank's surplus is terminated."

It is submitted that these statements are not sound in view of the property concepts which govern mutual savings societies. It has consistently been held that the relationship between the trustees and depositors of such institutions is one of trust, not of debtor and creditor, and that the trustees have a right to accumulate only such reserves as are required by statute or by a sound discretion for the purpose of protecting the deposits. The depositors have a vested right in the remainder. They have an interest in the continuity of the enterprise strong enough to enable them to maintain a bill in equity to restrain its dissolution. (*Barrett v. Bloomfield Savings Institution*, 64 N. J. Eq., 425, 54 Atl., 543, affirmed 66 N. J. Eq., 431, 57 Atl., 1131.)

These principles and the leading cases applying them were discussed by Judge Taft in his opinion below. (R., 43-45.) The attention of the court is especially directed to the cases of *Worcester County Institution for Savings v. City of Worcester*, 10 Cush. (Mass.) 128, and *Providence Institution for Savings v. Gardner*, 4 R. I., 484 (R., 45). Those were early cases holding that property in which a savings institution had invested funds could *not* be taxed as property *of the bank*, and inferring that it was properly

taxable to the depositors. In addition, attention is directed to a decision of this court set out in *Savings Bank of Danbury v. Loewe*, 242 U. S., 357. The question there before the court was whether an attachment of a savings bank account carried with it dividends which accrued after the writ of attachment was served. In holding that it did, this court used the following language (242 U. S., 357 at 358-360):

> "* * * If the right is vested the attachment reaches the whole of it, and therefore * * * it was admitted at the argument that in the case of an interest-bearing debt the subsequently accruing interest was held as well as the principal. * * * It may be true that apart from statute the attachment of stock in a corporation would not hold subsequently declared dividends, but, if so, that is because the stockholders have no right to the dividends until they are declared, which may never be if the directors see fit to convert earnings into capital. (Citations) The question then narrows itself to whether the so-called dividends of savings banks are analogous to dividends of a corporation or to interest due by contract upon a debt.
>
> "The plaintiff in error is an ordinary savings bank without stockholders. It is subject to a fiduciary duty to hold and invest for the benefit of its depositors all the funds that it receives and to pay over to them all the net income earned * * * [the depositor] has a vested right to the dividends, a vested right that the corporation should take the most prudent steps to secure them, with *an identified fund* devoted to the result. We do not perceive why the possibility of there being no earnings * * * or a possibility of the earnings being greater than was expected, should make the right less a present one, subject to and covered by the attachment * * *." (Emphasis supplied.)

It should also be pointed out that the statute under which appellant is organized, Section 710-148d, General Code (See: Stipulation, R., 6), specifically provides that "Invest-

ments (of deposits) may be made * * * and the income of profits thereof *shall* be applied and divided among the persons making deposits," and that appellant is a true savings bank.

B. The Property Rights of the Depositors Are Subject to Taxation by Assessing the Fund Which is Available For the Payment of Dividends.

Assuming that the depositors do have definable property rights in the surplus and reserves of the appellant, how is the state to reach those interests for the purpose of assessing its taxes without running afoul of the decisions of this Court? The appellant contends that it cannot be done, saying that any reduction of the earnings fund is an assessment against the bank. The Tax Commissioner contends that because of the nature of appellant's enterprise he can assess the tax in question, *against any earnings available to the depositors for distribution*, whenever such earnings exist. (The Supreme Court of Ohio limited the collection of the tax to the availability of such a fund. See branch 7 of the syllabus, R., 31.)

At the beginning of this argument attention should be directed to a matter which appellant apparently misapprehends concerning its own organization. The governing statute, Section 710-148b, General Code (R., 6), clearly provides that "The incorporators * * * shall have the powers provided in section 8623-99, General Code," (corporations not for profit) and that "So far as consistent with this act, all provisions * * * relating to corporations *not for profit* shall apply * * * hereunder." Appellant insists upon drawing analogies and citing cases dealing with corporations for profit having shares of stock. It is submitted that such precedents are not applicable here.

In keeping with its reliance upon shares of stock, appellant also insists that the rule of *Van Allen v. Assessors*, 3 Wall., 573, is applicable only when the ownership interests being taxed are represented by shares in a corporation for profit. It is submitted, however, that the underlying basis of the *Van Allen* case is a recognition of *property* rights, and that the property rules announced were applied to taxation of shares of stock because that was the question before the court. We now are confronted with a question of proper taxation of other interests.

It so happens that the rules of taxation which have grown out of the *Van Allen* case, and from cases such as *National Bank v. Commonwealth*, 9 Wall., 353, which authorize assessment of shares against the corporation with a right of reimbursement, are particularly suited to taxation of the separate property in corporate shares. The shares are easily definable and are transferable. *They have no vested right in any distributions from the corporation.* It is only right that taxes levied against them should be restored to the corporation; and it is not accurate to say that an assessment against funds in the hands of the corporation reduces their value proportionately. (Cf: *Home Savings Bank v. Des Moines*, 205 U. S., 503.) But there is nothing God-given about such a scheme of taxation, nor is it the only one that can be applied when the object of taxation is a completely different set of property interests.

In the case now before this court the property interests are *not* easily definable and they are *not* withdrawable or transferable. *But they do have a vested right in earnings of the corporation.* And it *is* accurate to say that an assessment against funds in the hands of the corporation available for distribution does proportionately reduce the amount of each property interest. Therein lies the distinc-

tion from the cases relied on by the appellant. There is the justification for the holding of the Supreme Court of Ohio; and there is the answer to the question before this Court of whether Ohio properly applied the rationale of the *Van Allen* case to the taxation of the ownership interests in the appellant.

CONCLUSION.

The parties here are contesting whether certain tax money shall go to the state of Ohio or to the appellant. In all cases of this sort this court has consistently said that its concern is with the Constitutional and statutory immunity of federal obligations from state taxation. The *Bank of Commerce* case and the *Bank Tax* case were designed to extend the protection of *Weston v. City of Charleston*, 2 Peters, 449, to direct assessments against corporate capital. The rule of the *Van Allen* case was designed to allow the states to assess separate property interests where they exist. Assuming that separate property interests do exist in this case, the appellant has not shown that the taxation of such interests creates any more of a burden on Federal obligations than does the taxation of shares of stock, so long sanctioned by this Court. Rather, appellant has sought by a catatorical denial of the existence of a property right and by a slavish insistence upon a certain form of payment, to receive for itself a tax windfall which has no relation to the protection of the federal securities involved.

Many of the property questions in this case are almost academic. Most of appellant's depositors do not know that they belong to a society which must divide its profits or that they are obligated to share in the losses if the society falls on evil days. Since their deposits are insured they

will never have to face that latter possibility. But those facts do not transform the nature of appellant's business organization nor prevent the Supreme Court of Ohio from correctly defining the property interests. It cannot properly be said here that the Ohio court created fictitious interests in order to avoid the decisions of this court, and that is the only real federal question in the case. Since it did not, the matter is simply one for the application of the rule of the *Van Allen* case.

It is therefore submitted that the decision of the Supreme Court of Ohio was correct, and that appellant's appeal should be dismissed or the decision of the lower court affirmed.

Respectfully submitted,

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No. 204

In the Supreme Court of the United States

OCTOBER TERM, 1954

SOCIETY FOR SAVINGS IN THE CITY OF CLEVELAND,
APPELLANT

v.

STANLEY J. BOWERS, TAX COMMISSIONER OF OHIO

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

The entry of the Board of Tax Appeals, State of Ohio (R. 18-30), is not reported. The opinion of the Supreme Court of Ohio (R. 30-53) is reported at 161 O. S. 122.

JURISDICTION

The judgment of the Supreme Court of Ohio was entered on March 10, 1954. (R. 53.) An application for rehearing was seasonably filed and

was denied by order dated March 31, 1954. (R. 54.) The petition for allowance of an appeal was allowed June 3, 1954. (R. 1.) This Court, by order of October 14, 1954 (R. 54), noted probable jurisdiction, and by order dated January 31, 1955, substituted Stanley J. Bowers as the appellee in place of John W. Peck, formerly Tax Commissioner of Ohio. The jurisdiction of this Court to review the decision below by appeal is conferred by 28 U. S. C., Section 1257(2).

QUESTION PRESENTED

Whether the Ohio intangible property tax, which is measured by the capital, surplus or reserve fund, and undivided profits of incorporated mutual savings banks, is void as a tax upon obligations of the Federal Government, since no provision is made for deducting from the measure of the tax the value of such obligations held by the banks, and since the banks, which pay the tax, have no right to be reimbursed.

STATUTES INVOLVED

The pertinent provisions of the Ohio General Code appear in the Appendix, *infra*, pp. 19-27.

STATEMENT

Appellant, Society for Savings in the City of Cleveland (hereinafter referred to as the Society), is a mutual savings bank incorporated under the laws of Ohio. Its capital is not divided into shares of stock. (R. 6.)

Ohio intangible property taxes totalling $126,-

115.96 were assessed against the Society annually from 1947 through 1951. (R. 7.) The tax was imposed upon the "capital employed, or the property representing it" in the institution. 4-A Page's Ohio General Code, Section 5408. It was computed by applying a rate of two mills per dollar against the aggregate of the Society's capital, surplus or reserve fund, and undivided profits. Ohio Code, Section 5412. In computing this total, no deduction was made for United States Treasury obligations held by the bank among its assets. Had these obligations been deducted, no taxes would have been payable by the Society.

The taxes were paid by the Society, which, pursuant to state law, then applied to the Tax Commissioner for a certificate abating the assessments. (R. 3-5.) This application was denied by order of the Tax Commissioner, dated July 30, 1952. (R. 5.) A notice of appeal to the Board of Tax Appeals was duly filed by the Society on August 21, 1952. (R. 7.) The Board, by entry dated March 2, 1953, reversed the order of the Tax Commissioner and remanded the case with instructions to issue the certificate of abatement as requested. (R. 18-30.) The Tax Commissioner appealed to the Supreme Court of Ohio, which, on March 10, 1954, reversed the decision of the Board of Tax Appeals and affirmed the order of the Tax Commissioner. (R. 30-48.) The court held, one judge dissenting, that the tax was upon the intangible property interests held by the bank's depositors in its surplus, rather than on the bank itself. It,

therefore, held the tax valid even though the government obligations owned by the bank were not deducted from the measure of the tax. It relied for authority on the cases which permit a state to tax the full value of shares of stock in a corporation even though the corporation holds government obligations among its assets.

The Supreme Court of Ohio allowed the Society's petition for an appeal on June 3, 1954. (R. 1.) On October 14, 1954, this Court entered its order noting probable jurisdiction of the Society's appeal from the decision of the Supreme Court of Ohio, and invited the Solicitor General to file a brief as *amicus curiae*. (R. 54.) By order dated January 31, 1955, the Court ordered that Stanley J. Bowers be substituted as appellee for John W. Peck, formerly Tax Commissioner of Ohio.

SUMMARY OF ARGUMENT

1. The Ohio statutes levy an intangible property tax upon the "capital employed, or the property representing it" in financial institutions whose capital is not divided into shares of stock. The tax rate is applied against the aggregate "capital, the surplus or reserve fund and the undivided profits" of these institutions, and no provision is made for deducting from this total the value of federal obligations held by the banks. The tax is assessed against and paid by the financial institutions.

Long-settled principles govern the determination of whether this tax is valid. It is unquestioned

that the power of the Federal Government to borrow money on its credit precludes a state from imposing property taxes directly or indirectly upon obligations of the United States. In recognition of this principle, it has been held repeatedly that a state property tax upon the capital or net worth of a corporation holding federal obligations is void unless provision is made for deducting the value of these obligations from the measure of the tax. *E.g., Bank of Commerce* v. *New York City*, 2 Black 620. On the other hand, the states may tax the full value of the shares in such a corporation because a share of stock is a property interest distinct from the assets held by the corporation. *E.g., Van Allen* v. *Assessors*, 3 Wall. 573. And such a tax may be collected from the corporation so long as it is in fact a tax on the shareholders for the payment of which the corporation is entitled to reimbursement from them.

2. Analogizing the depositors of a mutual savings bank to the shareholders of a corporation which has capital divided into shares, the Ohio Supreme Court upheld the tax in this case as one upon "the ownership interests of the depositors" rather than upon the bank itself. It recognized that there is no express statutory authority for the bank to obtain reimbursement from its depositors for the tax payment. It correctly observed that such express authority is unnecessary so long as the bank is in fact entitled to reimbursement. But it nowhere indicated that the bank has any such right. Instead, it emphasized only that the

tax "amounts to" one upon the depositors since, by reducing the bank's assets, it diminishes their "ownership interests" or the amount available to pay interest on their deposits. In this we believe the court erred.

3. A tax upon the corporation always reduces the corporate surplus and is in this sense borne by the shareholders. Nevertheless, this Court's decisions make it clear that a tax upon a corporation is not in legal effect a tax upon the shareholders. And so it is settled that a property tax upon a corporation, without deducting the corporation's federal securities from the measure of the tax, cannot be sustained on the theory that it "amounts to" a tax upon the shareholders. *Home Savings Bank* v. *Des Moines*, 205 U. S. 503. This rule applies here and eliminates the basis for the decision below. Because the tax in this case falls and rests upon the bank, and because there appears to be no right in the bank to obtain reimbursement for the payment from its depositors, the tax is invalid.

ARGUMENT

The Ohio Tax Is Imposed upon Obligations of the United States and Is Therefore Unconstitutional

1. The Ohio statutes involved in this case levy an intangible property tax upon the "capital employed, or the property representing it, in a financial institution" whose capital is not divided into shares of stock. Ohio General Code, Sections 5408 and 5628-1 (Appendix, *infra*, pp. 20-21, 25). A rate of two mills per dollar is applied against the aggre-

gate of the "capital, the surplus or reserve fund and the undivided profits" shown by such institutions on an annual report filed with the state tax commission. *Id.*, Section 5412 (Appendix, *infra*, pp. 23-24). No provision is made for deducting from this total the value of obligations of the Federal Government included among the assets of the bank. The tax is assessed in the name of, and is paid by, the bank. *Ibid.* The statute does not expressly state that the bank is to pay the tax on behalf of its depositors, nor is there express authorization for the bank's recovery from its depositors of the tax paid. The question here is whether the tax thus imposed is invalid because its impact falls in part upon federal securities.

As the Supreme Court of Ohio observed (R. 35), the "basic propositions of law" which control this inquiry "seem to be well settled." It is clear, to begin with, that the right of the Federal Government to borrow upon its credit (U. S. Const., Art. I, sec. 8, cl. 2) by implication precludes the imposition of state property taxes upon obligations of the United States. This principle has long been embodied in a federal statute.[1]

While this Court has not since 1828 been faced with an attempt to impose a tax directly upon federal obligations (*Weston* v. *City Council of Charleston*, 2 Pet. 448), numerous cases have dealt with statutes asserted to effect the same result

[1] The provision first appeared in the Act of February 25, 1862, c. 33, 12 Stat. 345, Sec. 2. It is now found in Section 3701, Revised Statutes (31 U. S. C., 1952 ed., Sec. 742).

indirectly. It has been settled by the decisions that property taxes upon the capital or net worth of a corporation holding federal securities among its assets are unconstitutional where no provision is made for deducting the value of these securities from the measure of the tax. *Bank of Commerce* v. *New York City*, 2 Black 620; *Bank Tax Case*, 2 Wall. 200; *Banks* v. *Mayor*, 7 Wall. 16; *Bank* v. *Supervisors*, 7 Wall. 26; *Home Savings Bank* v. *Des Moines*, 205 U. S. 503; *Farmers Bank* v. *Minnesota*, 232 U. S. 516; cf. *New Jersey Ins. Co.* v. *Division of Tax Appeals*, 338 U. S. 665. On the other hand, a state is free to tax the stockholders of a corporation on the full value of their shares of stock even though the corporation holds obligations of the Federal Government among its assets. The cases establishing this rule recognize a share of stock as a property interest separate and distinct from the assets held by the corporation. *Van Allen* v. *Assessors*, 3 Wall. 573; *People* v. *Commissioners*, 4 Wall. 244; *National Bank* v. *Commonwealth*, 9 Wall. 353; *Cleveland Trust Co.* v. *Lander*, 184 U. S. 111; *Des Moines Bank* v. *Fairweather*, 263 U. S. 103; see *McCulloch* v. *Maryland*, 4 Wheat. 316, 436-437. Under these decisions, where the legal incidence of the tax is actually upon the shareholders, collection may be made from the corporation so long as the corporation has "the right to reimbursement for the tax paid from [its] shareholders, either under some express statutory authority * * * or under the general principle of law that one who pays the debt of another

at his request can recover the amount from him." *Home Savings Bank* v. *Des Moines*, 205 U. S. 503, 518; *Citizens Nat'l Bank* v. *Kentucky*, 217 U. S. 443; *Aberdeen Bank* v. *Chehalis County*, 166 U. S. 440; *National Bank* v. *Commonwealth*, 9 Wall. 353; see also *Des Moines Bank* v. *Fairweather*, 263 U. S. 103, 111; *Corry* v. *Baltimore*, 196 U. S. 466, 472.

Examined in the light of the foregoing principles, the Ohio tax appears, in our view, to be invalid. Though characterized by the court below as a tax upon the appellant bank's "owners" (depositors), the tax seems "in practical operation and effect" (*New Jersey Ins. Co.* v. *Division of Tax Appeals*, 338 U. S. 665, 673) to fall and rest upon the bank itself—and thus upon the bank's federal securities.

2. The Supreme Court of Ohio found from the language and scheme of the state statutes a legislative purpose to impose the tax in question upon the depositors in the mutual savings bank rather than the bank itself. Pointing out that the tax is levied upon "the capital employed, or the property representing it, in [the] financial institution," the court concluded that the quoted words describe not the bank's property but "the ownership interests of the depositors" in the bank's surplus (R. 45; see also R. 40, 41-42, 46, 47). Analogizing these "ownership interests" to the interests represented by shares of stock in a corporation,[2] the court

[2] The court did not contrast the two types of ownership interests, though the differences are substantial. A mutual

found controlling the line of decisions permitting state taxation of corporate shares without deduction for federal securities held by the corporation. *Supra*, p. 8.

The Ohio court drew support for this conclusion from the fact that the tax is imposed by the same statute (Ohio General Code, Section 5408) which taxes shares of stock in incorporated and unincorporated financial institutions whose capital is divided into shares. (R. 39-40.) Pursuing its analogy between the proprietary interest of a shareholder and that of a depositor in a mutual savings bank, the court found no basis for imputing to the legislature an "inconsistent intent" to tax the "property of the owners of the financial institution" which divides its capital into shares while "taxing the property of the financial institution" itself where the capital is not divided into shares. The court observed that the tax on shares, like the present tax, is assessed against and paid by the bank. It acknowledged, however, that there is express statutory authorization for reimburse-

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savings bank depositor has no voice in the management of the institution. Management is in the hands of trustees, who are either a self-perpetuating group or are elected by a larger group (not depositors) known as corporators. Consequently, the decision which determines the amount of the surplus is made by individuals not selected by the depositors. Moreover, the size of the surplus is in part determined by state statutes which impose minimum size requirements for the protection of the depositors. 1 Ohio Code, Sec. 710-148e. Another important difference is that, unlike the shareholder, the depositor cannot transfer his interest in the surplus. See, generally, American Institute of Banking, *Savings Banking* (1946), pp. 36-38, 56-66.

ment from shareholders (Ohio General Code, Sections 5672 and 5673, Appendix, *infra*, pp. 25-26), while there is no comparable provision for reimbursement of the mutual bank by its depositors (R. 42). But it noted, citing cases to which we have referred (*supra*, pp. 8-9), that "such a provision is not necessary to enable such a financial institution to secure such reimbursement." (R. 42.)

It is here that we reach the crux of the narrow problem in this case. If in fact the appellant bank paid the Ohio tax as agent of its depositors, and if it were in fact able under Ohio law to secure reimbursement from them for such payment, this brief would not question the validity of the tax. As we read the opinion of the Ohio Supreme Court, however, and as it was read by the dissenting judge (R. 49-50), there appears actually to be no way in which the institution may obtain reimbursement from its depositors for the tax payments. Instead, the majority opinion repeatedly states that the bank's payment, necessarily reducing "the intangible property interests of ownership" possessed by the depositors, may for this single reason be viewed as payment by the depositors. In this, we believe the court was mistaken; and it is on this ground, which appears ultimately to be the sole basis for the decision, that we think it should be reversed.

3. Immediately following its observation that no express provision for reimbursement is necessary, the opinion of the majority below states (R. 43) that "payment by the financial institution of

the tax will always in effect amount to payment by those who are the beneficial owners of such intangible property [the depositors]." This point underlies the remainder of the opinion. There is no suggestion that, apart from this automatic diminution of the depositors' "interests of ownership" through reduction of the bank's assets, there is any way in which the bank may be reimbursed by the depositors. The court refused to extend to mutual institutions like the appellant the statutory provisions for reimbursement available to banks which have shareholders. (R. 42.) Nor did it intimate that an independent right of reimbursement exists under general principles of Ohio law. There is, in short, no indication that the dissenting judge is mistaken when he describes the majority as "[a]dmitting that there is no way for the institution to obtain reimbursement from such depositors for the tax paid on the assets" (R. 50).[3]

The decision below has thus overlooked the distinction, frequently emphasized by this Court in recent years, between the economic burden of a

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[3] While the appellee suggested in his Statement in Opposition to Appellant's Statement of Jurisdiction and Motion to Dismiss or Affirm (pp. 5-7) that the appellant may have a right of reimbursement "under some general principle of law" (p. 6), the opinion below affords no support for the suggestion beyond the brief statement that an express statutory provision for reimbursement is not essential. The extended discussion in the opinion thereafter of the point that payment by the bank amounts to payment by the depositors would be wholly unnecessary if the court considered that the bank possesses a direct right of reimbursement from the depositors. Since the existence of such a right would have brought the case within this Court's decisions upholding state taxes, the failure to specify its existence is persuasive that there is none.

tax and its legal incidence. The legal incidence of a tax is upon the person on whom the tax falls and rests; it is not displaced because the economic burden of the tax may pass to another. *James* v. *Dravo Contracting Co.*, 302 U. S. 134; *Alabama* v. *King & Boozer*, 314 U. S. 1; *Esso Standard Oil Co.* v. *Evans*, 345 U. S. 495.[4] Contrariwise, a tax which is invalid because its incidence falls upon the Federal Government, its property, or obligations will not be saved because the state could have enacted another tax with a different legal incidence but precisely the same economic impact. *Kern-Limerick, Inc.* v. *Scurlock*, 347 U. S. 110.

In the specific context of the problem presented here, the effort to equate legal incidence with economic burden was long ago rejected by this Court. In *Home Savings Bank* v. *DeMoines*, 205 U. S. 503, describing the arguments advanced in support of the tax there, this Court said (p. 519):

> One other consideration only needs to be noticed. It is said that where a tax is levied upon a corporation measured by the value of the shares in it, it is equivalent in its effect to a tax (clearly valid) upon the shareholders in respect of their shares, because, being paid by the bank, the burden falls eventually upon

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[4] The suggestion in the appellee's Statement in Opposition (p. 8) that the tax here can be sustained because of "the complete identity of the bank and its depositors" proves too much. If there were such a "complete identity," the tax would necessarily fail, for the depositors would then own the bank's assets, including its federal securities, and the tax would fall upon their ownership interest.

> the shareholders in proportion to their holdings. It was upon this view that the lower court rested its opinion.

The Court answered (p. 520) that——

> * * * if given the effect claimed, the consideration that the ultimate burden of the tax is distributed upon the shareholders in proportion to their holdings, would have saved the taxes condemned in the *Bank of Commerce* case [2 Black 620] and the *Bank Tax* case [2 Wall. 200], and indeed all taxes assessed upon the property of corporations, and the immunity from state tax of United States bonds owned by corporations would indirectly be absolutely destroyed.

It is clear, then, that whatever its ultimate impact in economic terms, "a tax on a corporation or its property is not the legal equivalent of a tax on the stock, in the names of the stockholders." *Owensboro National Bank* v. *Owensboro*, 173 U.S. 664, 677. A corporation, as a distinct legal entity, is the owner of the corporate assets; the shareholders or others who possess the equity in the corporation do not own those assets. The relationship between the corporation and its shareholders is not, of itself, one of agent and principal. *National Carbide Corp* v. *Commissioner*, 336 U.S. 422, 437-439; *Moline Properties* v. *Commissioner*, 319 U.S. 436; *Burnet* v. *Commonwealth Imp. Co.*, 287 U.S. 415. Although a tax payment by a corporation, like any other disbursement, reduces the corporate assets and reduces the stockholders' equity, *i.e.*,

the fund available for dividends and for distribution on liquidation, any such payment is made by the corporation as its own and out of its own funds; it is not made by the stockholders or on their behalf. Indeed, as we have noted (fn. 4, *supra*, p. 13), any other conclusion would encounter the constitutional objection that the tax is being imposed on the shareholders' ownership of federal obligations.

The court below undertook to distinguish the *Home Savings Bank* case on the ground (R. 46-47) that the tax there was "levied" on the corporation while here it is "levied" on the depositors. We recognize, of course, that the construction of the state statute adopted by the state court will be accepted as determining how the provision was intended to operate. It is equally clear, however, that it rests with this Court to decide for itself whether the statute, as applied by the state, infringes the Constitution. *Kern-Limerick, Inc.* v. *Scurlock*, 347 U.S. 110; *New Jersey Ins. Co.* v. *Division of Tax Appeals*, 338 U.S. 665; *United States* v. *Allegheny County*, 322 U.S. 174, 184; *Richfield Oil Corp.* v. *State Board*, 329 U.S. 69. And forms of words or descriptive labels cannot suffice to destroy an exemption established by the Constitution for the benefit of the United States. *Missouri* v. *Gehner*, 281 U.S. 313, 321; *Macallen* v. *Massachusetts*, 279 U.S. 620, 626; *National Life Ins. Co.* v. *United States*, 277 U.S. 508, 519. So here, the critical point remains that a tax, no matter how it may be characterized for other purposes, is not "levied" in a constitutional sense on a person who, though he

may bear or share the economic burden, has no liability to pay the tax as a tax. *Kern-Limerick, Inc.* v. *Scurlock, supra; Esso Standard Oil* v. *Evans*, 345 U.S. 495; *Alabama* v. *King & Boozer*, 314 U.S. 1.[5] The depositors in this case have no such liability; at most, the only effect of the tax on them, according to the decision below, is to diminish indirectly their interest in the bank's surplus or to reduce the earnings which might be paid to them in the form of interest on their deposits. Since the very point decided by the *Home Savings Bank* case is that such an indirect effect on shareholders does not justify the conclusion that the tax is being imposed upon them, the attempt of the court below to distinguish that case seems inadequate.

We believe, in sum, that the tax in this case, as construed and applied under the decision below, is assessed against the bank, is measured by its assets, and is paid by it. The state statute neither names the bank a tax collector nor provides authorization for it to collect the tax from any source other than its own funds. The tax falls upon the bank and remains there. The result is an invalid levy upon the federal securities held by the bank.

In our discussion of this case, we have adhered closely to the long-standing distinction between state property taxes upon corporations owning

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[5] See also: *McGoldrick* v. *Berwind-White Co.*, 309 U.S. 33; *Colorado Bank* v. *Bedford*, 310 U.S. 41, 51; and *Fed. Land Bank* v. *Bismarck Co.*, 314 U.S. 95, 99; cf. *Carson* v. *Roane-Anderson Co.*, 342 U.S. 232, 233.

federal securities and similar taxes upon shares of stock in such corporations. We have accepted the position of the court below that for purposes of this distinction the depositors of a mutual savings bank may be viewed as having ownership interests comparable to those of a shareholder in an institution which issues capital stock. But cf. fn. 2, *supra*, pp. 9-10. We have argued only that the reasoning of the court below obliterates the distinction when it upholds a tax upon the corporation on the sole ground that such a tax "amounts to" a tax upon the depositors, despite the absence of any apparent means by which the corporation can seek direct reimbursement from the depositors.

It is impossible to say how much difference the distinction makes in terms of the economics of selling federal obligations. We believe, nevertheless, that the well established rules should be maintained without judicial modification. If the immunity of the United States is to be redefined or judged by new standards, based on complex economic considerations, the task is more appropriate for Congress than for the courts. Cf. *Kern-Limerick, Inc.* v. *Scurlock*, 347 U. S. 110, and *Alabama* v. *King & Boozer*, 314 U.S. 1.

CONCLUSION

The judgment of the Supreme Court of Ohio should be reversed.

Respectfully submitted,

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FEBRUARY, 1955.

APPENDIX

4-A Page's Ohio General Code Annotated:

SEC. 5324. "Deposits" defined. The term "deposits" as so used, includes every deposit which the person owning, holding in trust, or having the beneficial interest therein is entitled to withdraw in money, whether on demand or not, and whether evidenced by commercial or checking account, certificate of deposit, savings account or certificates of running or other withdrawable stock, or otherwise, * * *

SEC. 5328-1. *Property to be entered on classified tax list and duplicate; exemption.* All moneys, credits, investments, deposits, and other intangible property of persons residing in this state shall be subject to taxation, excepting as provided in this section or as otherwise provided or exempted in this title; * * * non-withdrawable shares of stock of financial institutions and dealers in intangibles located in this state shall be subject to taxation; * * * non-withdrawable shares of stock of financial institutions located outside of this state, belonging to persons residing in this state, shall not be subject to taxation. Such property, subject to taxation, shall be entered on the classified tax list and duplicate of taxable property or on the intangible property tax list in the office of the auditor of state and duplicate thereof in the office of the treasurer of state, as prescribed in this title.

A corporation shall not be required to list

any of its investments in the stocks of any other corporation or in its own treasury stock.

SEC. 5406. [*Deposits required to be returned by financial institutions; exception.*] The deposits required to be returned by financial institutions pursuant to this chapter include all deposits as defined by section 5324 of the General Code to the extent that such deposits are made taxable by section 5328-1 of the General Code, * * *.

SEC. 5407. [*"Financial institution" defined.*] The term "financial institution" as used in this chapter includes every person who keeps an office or other place of business, in this state, and engages in the business of receiving deposits, and of lending money, buying or selling bullion, bills of exchange, notes, bonds, stocks, or other evidences of indebtedness, with a view to profit. * * *

SEC. 5408. [*Taxable property of financial institution, how listed, assesed and taxed.*] All the shares of the stockholders in a financial institution, located in this state, incorporated or organized under the laws of the state or of the United States, the capital stock of which is divided into shares, excepting such as are defined as "deposits" in section 5324 of the General Code, and all the shares of the stockholders in an unincorporated financial institution, located in this state, the capital stock of which is divided into shares held by the owners of such financial institution, and the capital

employed, or the property representing it, in a financial institution the capital of which is not divided into shares, or which has no capital stock, located in this state, shall be listed and assessed at the book value thereof, and taxed in the manner provided in this chapter.

SEC. 5409. *Real estate of financial institution, how and where taxed.* The real estate of a financial institution shall be taxed in the place where it is located, in like manner as the real estate of persons is taxed; but the tax provided for in this chapter shall be in lieu of all other taxes on the other property and assets of such institution.

SEC. 5410. [*Record of names and residence of stockholders and shares of each; inspection.*] There shall be kept in the offices at all times where the business of such financial institution is transacted, a full and correct list of the names and residences of the stockholders therein, and the number of shares held by each, which, at all times during business hours, shall be open to the inspection of all officers who are or may be authorized to list or assess such shares for taxation, or to administer the laws relating to such assessment.

SEC. 5411. [*Annual report of resources and liabilities of banks and financial institutions.*] The cashier or other principal accounting officer of each incorporated bank, the secretary or other principal accounting officer of each other incorporated financial institution, the

cashier, manager or owner of each unincorporated bank, and the manager, owner or owners of each other unincorporated financial institution, shall return to the department of taxation between the first and second Mondays of March, annually, a report under oath, exhibiting in detail, and under appropriate heads, the resources and liabilities of such institution at the close of business on the thirty-first day of December next preceding.

SEC. 5411-1. [*Day for listing and assessing taxable deposits fixed by commission; notice of action.*] On or before the fifth day of December annually, the tax commission of Ohio shall fix the day as of which the taxable deposits in financial institutions shall be listed and assessed. The day so fixed shall be between the first and the thirtieth days of November both inclusive and the action of the commission shall be taken not more than five days after the day so fixed. Notice of such action shall be immediately given to each financial institution and to the auditor of each county by registered mail, and the date so fixed shall be printed or stamped on the forms of return to be made by all financial institutions. The dates herein fixed for the action of the commission are directory merely, and if through inadvertence or mistake such action is not taken at the time herein prescribed, or the notice herein required to be given to a financial institution or a county auditor is not

duly given, the remaining requirements of this chapter and the validity of any assessment made hereunder shall not be affected thereby.

SEC. 5411-2. *Report of financial institution; contents.* The report of each financial institution made pursuant to section 5411 of the General Code shall also show the aggregate balances of the taxable deposits of its depositors, in each county in which the institution maintained an office or offices for the receipt of deposits, at the end of business on the day fixed by the board of tax appeals pursuant to section 5411-1 of the General Code. The report shall show also the names and addresses of all depositors whose deposits were wholly withdrawn from such institution between the day so fixed and the date on which notice of the fixing thereof was received by such institution, or if no such notice was received, then between the day so fixed and the first day of January next following, and the amount of the taxable deposits of each such depositor on the day so fixed.

SEC. 5412. *Tax commissioner to ascertain and assess all taxable shares and capital of financial institution; depositors to be assessed, when.* Upon receiving such report the tax commissioner shall ascertain and assess all the taxable shares of such financial institution, or the value of the property representing the capital employed by such financial institution, not divided into shares, at the aggregate amount

of the capital, the surplus or reserve fund and the undivided profits as shown in such report, and the amount of taxable deposits of such institution in each county in which the institution maintained an office or offices for the receipt of deposits. Such amounts shall be assessed in the name of such financial institution excepting that the amounts of the taxable deposits wholly withdrawn from each such institution within the times mentioned in section 5411-2 of the General Code and separately set forth in such report shall be subtracted from the amount of taxable deposits so assessed and separately assessed in the names of such respective depositors. In the case of an incorporated financial institution all of whose shares constitute deposits as defined in section 5324 of the General Code such assessment of shares shall exclude the capital stock thereof as so shown but shall include the surplus or reserve and undivided profits so shown.

SEC. 5412-1. [*Certification of assessment of financial institution to state and county auditor; auditors to place amounts on tax list.*] On or before the first Monday of May annually, the tax commission of Ohio shall certify to the auditor of state the assessment of each financial institution located in the state and to each county auditor the assessment of each taxable deposit separately assessed in the name of a depositor residing in his county. The auditor of state shall place the amount so certified on the intangible property tax list in his office.

The county auditor shall place the amounts so certified on the classified tax list and duplicate of his county in the names of the depositors represented by such certificates.

SEC. 5638-1. *Tax levy on property on intangible property tax list; rates.* Annual taxes are hereby levied on the kinds and classes of intangible property, hereinafter enumerated, on the intangible property tax list in the office of the auditor of state and duplicate thereof in the office of treasurer of state at the following rates, to wit:

Investments, five per centum of income yield or of income as provided by section 5372-2 of the General Code; unproductive investments, two mills on the dollar; deposits, two mills on the dollar; shares in and capital employed by financial institutions, two mills on the dollar; shares in and capital employed by dealers in intangibles, five mills on the dollar; and moneys, credits and all other taxable intangibles, so listed, three mills on the dollar.

The object of such taxes levied on such property so listed are those declared in section 5414-19 of the General Code.

SEC. 5672. *Taxes a lien on non-withdrawable shares of a financial institution; collection of taxes; penalty.* Taxes assessed on non-withdrawable shares of stock, of a financial institution, shall be a lien on such shares from the first day of January in each year until they are paid.

It shall be the duty of every financial institu-

tion to collect the taxes due upon its shares of stock from the several owners of such shares, and to pay the same to the treasurer of state and any financial institution failing to pay the said taxes as herein provided, shall be liable by way of penalty for the gross amount of the taxes due from all the owners of the shares of stock, and for an additional amount of one hundred dollars for every day of delay in the payment of said taxes.

SEC. 5673. *Financial institution may deduct taxes from dividends of shareholders, when; lien.* Such financial institution paying to the treasurer of state the taxes assessed upon its shares, in the hands of its shareholders respectively, as provided in the next preceding section, may deduct the amount thereof from dividends that are due or thereafter become due on such shares, and shall have a lien upon the shares of stock and on all funds in its possession belonging to such shareholders, or which may at any time come into its possession, for reimbursement of the taxes so paid on account of the several shareholders, with legal interest; and such lien may be enforced in any appropriate manner.

SEC. 5673-1. [*Taxes a lien on deposits and shares of stock of financial institution; payment.*] Taxes assessed on deposits in a financial institution in this state shall be a lien on the deposit of each person as of the day fixed by the tax commission of Ohio for the listing

of such deposits. Taxes assessed on the shares of stock of such an institution, all of whose shares are withdrawable and defined as deposits in chapter four of this title, shall be a lien on such shares so defined as deposits as of the day so fixed. It shall be the duty of every financial institution to pay the taxes on the amount of such deposits and/or withdrawable shares assessed in its name to the treasurer of state and any such institution failing to pay such taxes as herein provided shall be liable by way of penalty for the gross amount of the taxes due on and with respect to all its deposits and withdrawable shares assessed in its name and for an additional amount of one hundred dollars for every day of delay in the payment of such taxes.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 220

RST FEDERAL SAVINGS AND LOAN ASSOCIATION OF WARREN

Appellant

v.

ANLEY W. BOWERS (Successor to John W. Peck) TAX COMMISSIONER OF OHIO

APPEAL FROM THE SUPREME COURT OF OHIO

STATEMENT AS TO JURISDICTION

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 220

FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF WARREN

Appellant

v.

STANLEY W. BOWERS (Successor to John W. Peck) TAX COMMISSIONER OF OHIO

STATEMENT AS TO JURISDICTION

The appellant, First Federal Savings and Loan Association of Warren, in support of the jurisdiction of the Supreme Court of the United States to review the above entitled cause on appeal, respectfully represents:

Statutory Provisions Conferring Jurisdiction

Jurisdiction of the Supreme Court of the United States to review upon appeal in the instant case is conferred by Title 28, United States Code, §§1257 (2), (3), 2101 (c), 2103.

Statutes of the State the Validity of Which Is Involved Herein

The statutes of the State of Ohio, the validity of which has been sustained by final judgment of the Supreme Court of Ohio as not being repugnant to the Constitution of the

United States are the statutes providing for and relating to assessment of intangible personal property taxes against financial institutions upon account of their deposits and the property representing capital employed by them measured in the case of appellant by its surplus or reserves and undivided profits, particularly, G. C. §§ 5324, 5328-1, 5406, 5407, 5408, 5409, 5410, 5411, 5411-1, 5411-2, 5412, 5412-1, 5638-1, 5673-1 and 5673-2. The pertinent parts of such statutes are quoted in the Appendix. All references are to the General Code applicable to this case—not to the Revised Code of Ohio which has since become effective.

Provisions of the Constitution and Laws of the United States to Which the Statutes of Ohio and the Judgment of the Supreme Court of Ohio Construing Them are Repugnant.

The statutes of Ohio as construed and applied by the judgment of the Supreme Court of Ohio are repugnant to the Constitution of the United States, Article I, Section 8 and Section 1 of the Fourteenth Amendment and to U. S. Code Title 31, Section 742 (R. S. 3701) and Title 12, Section 1433, the pertinent parts of which are quoted in the Appendix.

Date of Judgment and Date of Application for Appeal

The final judgment of the Supreme Court of Ohio which is now sought to be reviewed was dated March 10, 1954 but did not become final for the purpose of appeal until March 31, 1954, when appellant's Application for Rehearing was denied; the petition for appeal was presented herewith within 90 days thereafter as required by Title 28, Section 2101 (c)—i.e. on June 23, 1954.

Nature of Case and Rulings of the Court

The case originated by the timely filing by appellant with the Tax Commissioner of Ohio of an application for certificate of abatement of taxes illegally and erroneously assessed, overpaid and collected for each of the years 1947-1951 against the appellant as a financial institution upon account of its deposits and property representing capital employed, measured by its surplus or reserves and undivided profits. The application was based upon the fact that the taxes so assessed, collected and paid for each of the years included taxes upon United States bonds and stock in the Federal Home Loan Bank (a federal government instrumentality) owned and held by appellant, contrary to the statutes of the United States. This application was denied.

Appellant filed timely notice of appeal to the Board of Tax Appeals of Ohio which, after hearing, reversed the order of the Tax Commissioner in part and ordered the case remanded with instructions to deduct the value of United States bonds and Federal Home Loan Bank stock owned by the appellant in the several years involved from the assessment of property representing capital measured by reserves and undivided profits but denied the deduction from the value of deposits assessed against appellant of any part of such securities, which exceeded in value the reserves and undivided profits.

The Tax Commissioner appealed to the Supreme Court of Ohio from the decision insofar as it allowed deduction from reserves and undivided profits, and exemption in part from taxation, of the value of United States bonds and Federal Home Loan Bank stock.

The Supreme Court of Ohio reversed the order of the Board of Tax Appeals insofar as it permitted the deduction of Federal securities from reserves and undivided profits

or the property represented thereby and exempted the same from taxation in part.

An application for rehearing was filed by appellant and on March 31, 1954, denied. The opinion of the Supreme Court referred to, and was based generally upon, the reasons given in the opinion in *Society for Savings in the City of Cleveland* v. *Peck, Tax Commissioner*, decided on the same day. Society for Savings has no capital stock, and appellant has no capital stock, other than what were formerly known as withdrawable shares and by the tax law G. C. §5324 are defined and taxed as deposits. None of the holders of deposits has any right to withdraw any sum in excess of amounts credited upon his passbook and such sums are generally freely withdrawable.

Withdrawable savings and loan "shares", which are "deposits" under G. C. §5324, are excepted from the assessment of capital stock by G. C. §5408, and there being no capital stock in such cases, the section provides instead for asssessment of the "capital employed or property representing it" in such institutions. By G. C. §5412 the value of the property representing capital employed by such institutions is assessed at the aggregate amount of the capital (none in appellant's case), the surplus or reserve fund and undivided profits. By one clause of G. C. §5638-1 deposits are assessed at two mills on the dollar and by the next clause capital employed by financial institutions is assessed at two mills on the dollar. The taxes involved in this appeal were levied against appellant, measured by the book value of its assets less liabilities without deduction of Federal securities; they were paid by appellant and there is no provision of law whereby it can recover therefor from anyone else.

The state court in its opinion held the tax upon the property representing capital employed by the institution meas-

ured by reserves and undivided profits is a tax upon ownership interests of the owners of the institution and not upon any property of or belonging to such institutions—a tax upon the depositors in spite of the facts (1) that under the preceding clause of the statute (G. C. §5638-1), a tax was assessed upon the amount of the deposits; (2) that the depositors have no enforceable interest in property representing surplus or reserves and undivided profits; (3) that the depositors change from day to day at the rate, in the case of appellant, of one-third of all depositors in a year or a complete turnover of depositors in three years; and (4) the fact that there is no statutory provision for passing on the tax to the depositors and collecting the tax on property representing capital, if indeed it be a tax upon them. This last the court rationalized by saying that in effect the tax is passed on by reducing the assets of the institution available for the payment of dividends or interest upon deposits.

Substantiality of Questions Involved

This case involves the imposition of intangible personal property taxes upon property of a financial institution having no capital stock other than withdrawable shares (which by the tax statutes are defined and classified as deposits) upon a valuation including the full amount of deposits plus reserves and undivided profits without deduction therefrom of the United States bonds and stock in the Federal Home Loan Bank (a federal government instrumentality) which are, by Federal law, exempt from such taxes.

Prior to the enactment of the Federal statutes exempting such securities from state taxation it had been held that such taxation invades the fiscal powers of the Federal Government and is repugnant to the Constitution of the United States, Article I, Section 8.

Because the imposition of state tax upon Federal securi-

ties owned and held by appellant is unlawful and unconstitutional, the statutes construed to permit such imposition deprive appellant of its property without due process of law and deny appellant the equal protection of the laws; they are therefore repugnant also to Section 1 of the Fourteenth Amendment of the Constitution of the United States.

In the majority opinion the Supreme Court of Ohio attempted to circumvent the exemption under the Federal statutes and Constitution by holding that the tax is not, as assessed, against the appellant as a financial institution but is, in fact, imposed upon its depositors—one tax upon the value of the deposits as shown upon the passbooks and an additional tax (with which alone this appeal is concerned) upon the same depositors, upon the property representing surplus or reserves and undivided profits of the institution which the Court defined as an ownership interest of the depositors in the institution, despite the fact that they can never withdraw or realize upon any part of such so-called ownership interest short of the dissolution of the institution which is decidedly improbable unless and until by virtue of bad management or other adversity its assets should be so reduced as to eliminate reserves and undivided profits.

If such were the effect of the law, it would discriminate against depositors in appellant each of whom would thereby be taxed upon the value of his deposit plus a ratable portion of property representing reserves and undivided profits, as compared with depositors in banks and other financial institutions taxed under the same law but having issued permanent stock. In case of the latter, the depositors, under the Court's ruling, would be taxed only upon the value of their deposits as shown in their passbooks. This interpretation of the law imposing discriminatory double taxation upon appellant's depositors as compared with

those of other institutions having permanent capital stock would constitute a denial of the equal protection of the laws.

Furthermore, there is no provision whatever, practicable or otherwise, for the passing on of the tax on the interest of the depositors, if any, in the reserves and undivided profits.

It is not sufficient, as the state court said, that payment by a financial institution of tax against its depositors on their interests (if any they have) in reserves and undivided profits will necessarily reduce, to the extent of the payments made, the funds available for payment of interest on their deposits and that thus the institution "will always be able to reimburse itself" in effect. *Home Savings Bank* v. *Des Moines*, 205 U. S. 503.

It should be obvious that the questions involved are substantial.

With the ever increasing expense of operation of the Federal government, its ever growing financial participation in international activities beyond the borders of the United States and the myriad other requirements of government, the importance of protecting the fiscal powers of the United States becomes ever greater. The ability to finance its requirements by the issue and sale of bonds freely and free from taxation by the states which might diminish in the slightest degree the market value or investment attractiveness of Federal securities, is of the utmost importance. The question is of continuing importance and not limited to the particular years and amount involved herein.

Stage at Which Federal Questions Raised

The Federal questions sought to be reviewed were raised at all stages of the case—

(a) By the following statement in appellant's Claim for Refund and Abatement filed with the Tax Commissioner:

> "The obligations of the United States including the principal and accrued interest on bonds issued upon it and stock of the Federal Home Loan Bank were erroneously and illegally included in the tax base . . . Title 31 U. S. C. § 742; Title 12 U. S. C. § 1433; and *Rosch* v. *First Savings & Loan Association*, 203 S. W. 2d. 1006."

(b) In the appellant's Notice of Appeal to the Board of Tax Appeals as follows:

> "4. The value of United States Government Bonds, including principal and accrued interest thereon and stock of the Federal Home Loan Bank, a federal government instramentality, were erroneously and illegally included in the tax base or formula for assessment of the deposits (or capital), reserves and undivided profits of the Appellant and thereby in legal effect the State of Ohio imposed an illegal tax upon such securities exempted by the provisions of U. S. Code Title 31, Section 742 and Title 12, Section 1433.
>
> "5. The Statutes of Ohio as construed and enforced by the order of the Tax Commissioner and the order of the Tax Commissioner unjustly and illegally discriminate against the Appellant, deprive it of property without due process of law and deny it the equal protection of the laws contrary to the Fourteenth Amendment to the Constitution of the United States."

(c) In appellant's brief before the Board of Tax Appeals (pp. 4-6) citing, quoting from, and discussing at length: *McCulloch* v. *Maryland*, 4 Wheat. 316; *Wes-*

ton v. *Charleston*, 2 Pet. 449; *Banks* v. *Mayor*, 7 Wall. 16; *Bank of Commerce* v. *New York City*, 2 Black 620, 629; *Bank Tax Case*, 2 Wall 200; Title 31 U. S. C. § 742; Title 12 U. S. C. § 1433; *Bosch* v. *First Savings and Loan Association*, 203 S. W. 2d, 1006; *New Jersey Title Insurance Company* v. *Division of Tax Appeals*, 338 U. S. 665; 70 S. Ct. 413, holding such taxes repugnant to the Constitution and laws of the United States.

(d) The Board of Tax Appeals held the order of the Tax Commissioner erroneous in including in tax base the value of federal securities in assessing the value of the property representing the capital employed by appellant (i. e., its reserves and undivided profits) for the reasons stated in its entry in the case of *Society for Savings in the City of Cleveland* which were referred to and made a part of its entry in this case. We quote

> "Or, the question may be stated in another way, to wit:
>
> > Was the Tax Commissioner in error in including in the tax base the value of federal securities owned by appellant in assessing, pursuant to Section 5412, General Code, the value of 'property representing the capital employed by' appellant (a financial institution), the capital of which financial institution is not divided into shares?"

"The federal Constitutional provision and the federal statutory enactment relied on by appellant read as follows:

> *Constitution of the United States, Article I, Section 8*, Clause 2.
>
> The Congress shall have power * * * To borrow money on the credit of the United States, * * *.
>
> *United States Code, Title 31, Section 742* (Revised Statutes, Section 3701)
>
> Except as otherwise provided by law, all stocks, bonds, Treasury notes, and other obligations of the

United States, shall be exempt from taxation by or under State or municipal or local authority."

* * * * * * *

"However, the decisions of the Supreme Court of the United States leave no room for doubt but that a State tax upon the "capital employed, or the property representing it" (General Code, Section 5408), of a corporation is unconstitutional and violative of the requirement of the federal statute if and to the extent that the value of federal securities is included in the tax base. The cases sustaining the foregoing conclusion of law extend over a long period of years. People vs. Commissioners of Taxes, 2 Black 620 (1863); Bank Tax Case, 2 Wall. 200 (1864); Home Savings Bank vs. Des Moines, 205 U. S. 503 (1906); Farmers and Mechanics Savings Bank vs. Minnesota, 232 U. S. 516 (1914); Missouri vs. Gehner 281 U. S. 313 (1930); New Jersey Realty Title Insurance Company vs. Division of Tax Appeals, 338 U. S. 665 (1950)."

(e) This was recognized in the Tax Commissioner's Notice of Appeal to the Supreme Court of Ohio by the statement:

"2. The Board of Tax Appeals erred in holding that the intangible tax assumed by the appellee was an unconstitutional tax upon its capital invested in United States securities."

and in his brief filed in this and seven other cases in the Supreme Court of Ohio:

(pp. 16-17) "Two of the taxpayers—*Society for Savings* and *First Federal Savings & Loan*—do not have capital divided into shares. In taxing them the Tax Commissioner assessed their deposits as is provided by law, and assessed their surplus, reserves and undivided profits as "the value of the property representing the capital employed * * * not divided into shares." All of the taxpayers say that this

second assessment violates Article I, Section 8, of the United States Constitution which gives Congress the borrowing power, and Title 31, Section 742, United States Code, which exempts federal securities from local taxation. On this point the Board of Tax Appeals agreed with the taxpayers.

"The tax Commissioner concedes, of course that the literal language of Sections 5408 and 5412, General Code, refer to direct assessments of capital. He also agrees with the Board of Tax Appeals that since the cases of *Bank of Commerce* v. *New York City*, 67 U. S. (2 Black) 620, and the *Bank Tax Case*, 69 U. S. (2 Wall.) 200, a state tax upon "capital employed or the property representing it" is bad to the extent that federal securities are included in the tax base."

(f) Appellant's Answer and Reply Brief (p. 2) in the state Supreme Court set forth the following additional question presented by the appeal of the Tax Commissioner:

"2. Whether the statutes of Ohio construed to deny the deduction of Federal securities from the tax base for assessment of capital, surplus, or reserves and undivided profits would not be repugnant to the Constitution of the United States."

(g) In appellant's application for rehearing after announcement of the opinion of the Supreme Court in which a novel and untenable theory not argued by the attorney general at the hearing, was resorted to, by the following:

"The opinion presents an additional basis of unconstitutionality. As construed by the Court, the statutes would impose upon the deposits in each institution two separate taxes, i.e., a tax of two mills on the dollar of the amounts of the deposits and another tax of two mills on the dollar on the amount of the capital employed by the financial institution, that is, upon its sur-

plus, reserves and undivided profits. This is double taxation—two personal property taxes assessed against the same property—and results in depriving the Taxpayer of property without due process of law and denying it the equal protection of the laws contrary to the Fourteenth Amendment to the Constitution of the United States. The Supreme Court of the United States in *Senior* v. *Braden*, 295 U. S. 422, 55 S. Ct. 800 reversing the decision of this court in 128 O. S. 597 held that the Ohio intangible tax upon investments in land trust certificates representing interests in land which were also subject to real estate taxes was double taxation contrary to the Fourteenth Amendment. The depositors in Society for Savings and in the Taxpayer here are no different from the depositors in banks or savings and loan associations having permanent shares or capital stock yet their deposits, under the decisions announced, would be taxed doubly whereas the depositors in institutions having permanent shares or capital stock would be taxed only upon the withdrawal value of their deposits and this despite the fact that in each case the depositors have the protection of the reserves and undivided profits behind them guarding against any loss. This cannot be justified on the ground that there are two different kinds of property—the deposits on the one hand and the reserves and undivided profits on the other; for their rights are inseparable. So long as the depositor maintains his deposit, he has the protection of the surplus, reserves and undivided profits; but he cannot withdraw his deposit without losing that protection; hence, if there were any ownership interest coupled with the deposit, the two would constitute only one item of property and not two separate items. No value is added by surplus, reserves and un-

divided profits and the additional tax on deposits would be confiscatory."

Cases Supporting Jurisdiction

State taxation of bonds and stock of the United States and of Federal instrumentalities is an invasion of the fiscal powers of the United States under the Constitution, Article I, Section 8 and unconstitutional —*McCulloch* v. *Maryland*, 4 Wheat, 316; *Weston* v. *Charleston*, 2 Pet. 449; *Bank of Commerce* v. *New York City*, 2 Black 620, 629; *Bank Tax Case*, 2 Wall. 200-209; *Banks* v. *The Mayor*, 7 Wall. 16, 24; *Home Savings Bank* v. *Des Moines*, 205 U. S. 503; *New Jersey Title Insurance Co.* v. *Division of Tax Appeals*, 338 U. S. 665, 70 S. Ct. 413. Likewise such taxation is repugnant to the laws of the United States—*Home Savings Bank* v. *Des Moines*, 205 U. S. 503; *State of Missouri* v. *Gehner*, 281 U. S. 313, 50 S. Ct. 326; *New Jersey Title Insurance Co.* v. *Division of Tax Appeals*, 338 U. S. 665, 70 S. Ct. 413. Shares in the Federal Home Loan Bank, a federal government instrumentality, are exempt from State tax under the Federal statutes, *Roesch* v. *First Savings & Loan Assn.*, 203 S. W. 2d 1006, 1011.

Although the Supreme Court of the United States will generally accept the construction of the state law by the highest court of the state, it will review such a decision where it is unfounded, untenable, without fair or substantial support, essentially arbitrary or a mere device to prevent review of the decision upon the Federal question—*Enterprise Irrigation District* v. *Canal Co.*, 243 U. S. 157, 164; *Ward* v. *County Commissioners*, 253 U. S. 17, 22; *Lawrence* v. *State Tax Com.*, 286 U. S. 276, 282, 52 S. Ct. 556. A strained construction, not warranted by language of the statute cannot be sustained in order to make the law conform to a constitutional limitation—*Yu Cong Eng* v. *Trinidad*, 271 U. S. 500, 518-519; 46 S. Ct. 619, 623.

The Supreme Court is never bound by the state's characterization or determination of the incidence of the state tax or the form in which the taxing scheme is cast but will determine for itself the real nature, operation, substance and practical effect of the tax where the constitutionality of the tax is in question—*United States, et al* v. *Allegheny County*, 322 U. S. 174, 184; 64 S. Ct. 908, 914; *St. Louis S. W. Ry.* v. *Arkansas*, 235 U. S. 350, 362; *Carpenter* v. *Shaw*, 280 U. S. 363, 367; 50 S. Ct. 121, 123; *Richfield Oil Corp.* v. *State Board of Equalization*, 329 U. S. 69, 83; 67 S. Ct. 156, 164; *Senior* v. *Braden*, 295 U. S. 422, 430; 55 S. Ct. 800, 802; *N. J. Title Insurance Company* v. *Division of Tax Appeals*, 338 U. S. 665, 673, 70 S. Ct. 413, 417.

A state tax which purports to be a tax on the depositors or shareholders in a financial institution but is required to be paid by the latter without provision for recovery from the depositors is a tax against the institution itself upon its property, *Home Savings Bank* v. *Des Moines*, 205 U. S. 503.

The double imposition of property tax upon the same property is repugnant to the Fourteenth Amendment, *Senior* v. *Braden*, 295 U. S. 422, 430; 55 S. Ct. 800, 802.

Since the Board of Tax Appeals had eliminated or exempted United States bonds and Federal Home Loan Bank stock from the tax base and the Supreme Court on appeal for the first time so construed the statutes as to permit double taxation of appellant's depositors the raising of the question of unconstitutionality on that ground for the first time by application for rehearing was timely—*State of Missouri* v. *Gehner*, 281 U. S. 313, 320; 50 S. Ct. 326, 327; *Saunders* v. *Shaw*, 244 U. S. 317, 320.

Where a timely application for rehearing has been filed, as here, the finality necessary for review by the Supreme Court is deferred until the application is denied or until the

power to act upon it has expired—*Chicago G. W. R. Co.* v. *Basham*, 249 U. S. 164, 166.

A federal question created by an unexpected decision of the highest state Court is timely raised where presented in an application for rehearing even though the application is summarily denied without reference to the federal question. *Great Northern R. Co.* v. *Sunburst Oil Co.*, 287 U. S. 358, 366-367, 53 S. Ct. 145, 149; *Brinkerhoff-Faris Trust Co.* v. *Hill*, 281 U. S. 673, 677-678.

Opinions Below

The opinions in the court below are officially reported in 161 O. S. 194 and unofficially in 118 N. E. (2d) 667 and 53 O. O. 66. The majority (per curiam) opinion refers to and relies generally upon the majority opinion in *Society for Savings in the City of Cleveland* v. *Peck, Tax Commissioner*, which is officially reported in 161 O. S. 123 and unofficially in 118 N. E. (2d) 651 and 53 O. O. 53. All of such opinions are copied in the Appendix hereto.*

*(CLERK'S NOTE: The opinion in the case of *Society for Savings, etc.*, v. *Peck* is printed as an Appendix to the Statement as to Jurisdiction in No. 204 and is not printed here.)

Conclusion

WHEREFORE the appellant First Federal Savings and Loan Association of Warren respectfully submits that the Supreme Court of the United States has jurisdiction of this appeal; and that if the appeal should be considered as having been improvidently taken the Court should consider it as a petition for certiorari; all for the reasons stated herein and prays that the final judgment of the Supreme Court of Ohio be reversed and for such other relief as may be fit and proper.

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APPENDIX

Opinions of the Supreme Court of Ohio

First Federal Savings and Loan Association of Warren v. Peck, Tax Commissioner, 161 O. S. 149 (Nos. 33524 and 33525—Decided March 10, 1954.) Appeals from the Board of Tax Appeals.

The First Federal Savings & Loan Association of Warren, herein referred to as applicant, is incorporated under federal statutes and has only withdrawable shares.

It filed with the Tax Commissioner an application pursuant to subdivision 2 of Section 1464-3, General Code, for a certificate of abatement for alleged overpayment of taxes assessed pursuant to Sections 5406 to 5414, General Code, and levied pursuant to Section 5638-1, General Code (1) on "the amount of its deposits" (its withdrawable shares being defined by Section 5324, General Code, as deposits) and (2) on "the capital employed, or the property representing it, in" that instituiton.

It appeared that, if the amount of federal securities and the value of federal home bank stock owned by the applicant were deducted from the amount of its total assets, the remaining amount would be less than the amount of its withdrawable shares or deposits. The applicant claimed that the Tax Commissioner should not have taxed withdrawable shares of the institution as deposits at more than that remaining amount and should not have assessed any tax on "the capital employed, or the property representing it, in" the institution.

This application was denied by the Tax Commissioner. On appeal to the Board of Tax Appeals, the order of the Tax Commissioner was affirmed only so far as it related to taxes on the shares as deposits, and the Tax Commissioner was directed to issue the certificate of abatement requested so far as it related to taxes assessed on "the capital employed, or the property representing it, in" the institution.

In case No. 33524, the applicant has appealed to this court from that part of the decision of the Board of Tax Appeals which affirmed the order of the Tax Commissioner. In case

No. 33525, the Tax Commissioner has appealed to this court from that portion of the decision of the Board of Tax Appeals which reversed the order of the Tax Commissioner.

Per Curiam. For the reasons which we gave in support of our judgment in *Society for Savings in City of Cleveland v. Peck, Tax Commr., ante,* 122, we are of the opinion that the taxes involved in the instant cases, so far as they relate to "the surplus or reserve fund and the undivided profits" of the corporation, are taxes on the intangible property interests of the owners of the corporation representing their capital employed in the corporation, and those taxes are not taxes on the corporation or on the capital or the assets of the corporation. See also last sentence of Section 5412, General Code, and discussion thereof in *Society for Savings v. Peck, Tax Commr., supra.*

So far as the taxes involved in the instant cases relate to taxes on the withdrawable shares of the corporation as deposits, such taxes are clearly taxes levied against the owners of the deposits. See Sections 5406, 5324, 5412, 5412-1, 5638-1, 5673-1 and 5673-2, General Code.

In addition, the First Federal Savings & Loan Association of Warren has argued that its shares are exempt from taxation by reason of the provisions of Section 5323, General Code, reading:

"The term 'investments' as used in this Title, includes the following:

"Shares of stock in corporations, associations and joint stock companies, under whatever laws organized or existing, excepting (1) those in such corporations and associations as constitute instrumentalities of the federal government for the taxation of which by the several states no provision is made by the act of the Congress of the United States, (2) those in financial institutions, dealers in intangibles and domestic insurance companies as defined by Chapter four of this Title, and (3) such as are defined in this Chapter as 'deposits.' "

It is contended by the corporation that it comes within the first numbered exception. But see 12 U. S. Code, Section 1464h. However, it definitely is described by the words in the second numbered exception which read, "financial

institutions * * * as defined by Chapter Four of this Title [including Sections 5406 to 5414, General Code]." Likewise, Section 5324, which is in the Chapter in which Section 5323 appears, defines withdrawable shares, such as those of this corporation, as "deposits." Section 5406 does refer to Section 5324, General Code. Otherwise there is nothing in the assessment sections here involved (Sections 5406 to 5414, inclusive, General Code) which do refer to the Chapter in which Section 5323 is found. As held in *Broadview Savings & Loan Co. v. Peck, Tax Commr., ante*, 119, the provisions of Section 5323, General Code, are not to be read *in pari materia* with Sections 5406 to 5414, inclusive, General Code. Nothing in those sections justifies any reference to the exception relied upon by applicant in Section 5323, General Code.

Finally, it is argued that, since such a tax cannot be imposed on the owners of an unincorporated financial institution without deducting federal securities in the computation of the tax, such a deduction must also be made in computing the tax where, as here, an incorporated financial institution carrying on the same line of business is involved. We believe that the decision and the reasoning of the Supreme Court of the United States in *Des Moines National Bank v. Fairweather, Mayor*, 263 U. S. 103, 68 L. Ed. 191, 44 S. Ct. 23, is a complete answer to any such argument.

The decision of the Board of Tax Appeals so far as it relates to case No. 33524 is affirmed and so far as it relates to case No. 33525 is reversed.

Judgment accordingly.

Weygandt, C. J.; Middleton, Taft, Hart, Zimmerman and Lamneck, JJ., concur.

Stewart, *J.*:

Concurs so far as the decision of the Board of Tax Appeals is affirmed and dissents so far as such decision is reversed.

Provisions of the Constitution and Statutes of the United States

Constitution—Article I, Section 8

"To borrow Money on the credit of the United States;"

Constitution—Fourteenth Amendment, Section 1

"* * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

United States Code—Title 31, Section 742

"*Exemption from taxation.* Except as otherwise provided by law, all stocks, bonds, Treasury notes, and other obligations of the United States, shall be exempt from taxation by or under State or municipal or local authority. (R. S. § 3701.)"

United States Code—Title 12, Section 1433

"*Exemption from taxation; obligation acceptable as credit on debt of home owner.*

"Any and all notes, debentures, bonds, and other such obligations issued by any bank, and consolidated Federal Home Loan Bank bonds and debentures, shall be exempt both as to principal and interest from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States, by any Territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority. The bank, including its franchise, its capital, reserves, and surplus, its advances, and its income shall be exempt from all taxation now or hereafter imposed by the United States, by any Territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority; except that in any real property of the bank shall be subject to State, Territorial, county, municipal, or local taxation to the same extent

according to its value as other real property is taxed. The notes, debentures, and bonds issued by any bank, with unearned coupons attached, shall be accepted at par by such bank in payment of or as a credit against the obligation of any homeowner debtor of such bank. July 22, 1932, c. 522, § 13, 47 Stat. 735; May 28, 1935, c. 150, § 8, 49 Stat. 295."

General Code of Ohio

§ 5324 "*'Deposits' defined.* The term 'deposits' as so used, includes every deposit which the person owning, holding in trust, or having the beneficial interest therein is entitled to withdraw in money, whether on demand or not, and whether evidenced by commercial or checking account, certificate of deposit, savings account or certificates of running or other withdrawable stock, or otherwise, excepting (1) unearned premiums and surrender values under policies of insurance, and (2) such deposits in financial institutions outside of this state as yield annual income by way of interest or dividends in excess of four per centum of the principal sum so withdrawable." (114 O. L. 714, 716, Section 1)

§ 5328-1 "*Property to be entered on classified tax list and duplicate; exemption.*

"All moneys, credits, investments, deposits, and other intangible property of persons residing in this state shall be subject to taxation, excepting as provided in this section or as otherwise provided or exempted in this title * * *. Such property, subject to taxation, shall be entered on the classified tax list and duplicate of taxable property or on the intangible property tax list in the office of the auditor of state and duplicate thereof in the office of the treasurer of state, as prescribed in this title.

"A corporation shall not be required to list any of its investments in the stocks of any other corporation or in its own treasury stock." (120 O. L. 112, 113)

§ 5406 "*Deposits required to be returned by financial institutions; exceptions.*

"The deposits required to be returned by financial institutions pursuant to this chapter include all deposits as

defined by section 5324 of the General Code to the extent that such deposits are made taxable by section 5328-1 of the General Code, excepting deposits belonging to the federal government or any instrumentality thereof; or deposits to the extent of advances or advance payments made under any contract entered into by the federal government or any instrumentality thereof for the production of materials or supplies or the furnishing of services pursuant to authority of any act to further the war effort; or deposits belonging to the state of Ohio or any county, municipality corporation, school district, township, or other subdivision thereof, or to any other financial institution or to a dealer in intangibles or a domestic insurance company, or to an institution used exclusively for charitable purposes, or proceeds of loans which have been credited to the borrower but not disbursed, or advances by borrowers for the subsequent payment of specific obligations. If any deposit belonging to any of the classes required so to be returned consists in whole or in part of an amount representing uncollected checks and other uncollected items, credited thereto, one-half of the amount so represented shall be considered as withdrawable and to be so included in arriving at the aggregate balance of taxable deposits, required so to be returned, whether or not the depositor is in fact permitted to make withdrawals against the amount so represented and credited." (124 O. L. 156, § 1)

§ 5407 "[*'Financial institution' defined.*] The term 'financial institution' as used in this chapter includes every person who keeps an office or other place of business, in this state, and engages in the business of receiving deposits, and of lending money, buying or selling bullion, bills of exchange, notes, bonds, stocks, or other evidences of indebtedness, with a view to profit. * * *" (114 O. L. 714, 747, § 3)

§ 5408 "[*Taxable property of financial institution, how listed, assessed and taxed.*] All the shares of the stockholders in a financial institution, located in this state, incorporated or organized under the laws of the state or of the United States, the capital stock of which is divided into shares, excepting such as are defined as 'deposits' in section

5324 of the General Code, and all the shares of the stockholders in an unincorporated financial institution, located in this state, the capital stock of which is divided into shares held by the owners of such financial institution, and the capital employed, or the property representing it, in a financial institution the capital of which is not divided into shares, or which has no capital stock, located in this state, shall be listed and assessed at the book value thereof, and taxed in the manner provided in this chapter." (115 O. L. 571, §1)

§5409 "*Real Estate of financial institution, how and where taxed.*

The real estate of a financial institution shall be taxed in the place where it is located, in like manner as the real estate of persons is taxed; but the tax provided for in this chapter shall be in lieu of all other taxes on the other property and assets of such institution." (114 O. L. 714, 747, §3)

§5410 "[*Record of names and residence of stockholders and shares of each; inspection.*]

"There shall be kept in the offices at all times where the business of such financial institution is transacted, a full and correct list of the names and residences of the stockholders therein, and the number of shares held by each, which, at all times during business hours, shall be open to the inspection of all officers who are or may be authorized to list or assess such shares for taxation, or to administer the laws relating to such assessment." (114 O. L. 714, 748, §3)

§5411 "*Annual report of resources and liabilities of banks financial institutions.*

"The cashier or other principal accounting officer of each incorporated bank, the secretary or other principal accounting officer of each other incorporated financial institution, the cashier, manager, or owner of each unincorporated bank, and the manager, owner or owners of each other unincorporated financial institution, shall return to the department of taxation between the first and second Mondays of March, annually, a report exhibiting in detail, and under appro-

priate heads, the resources and liabilities of such institution at the close of business on the thirty-first day of December next preceding." (124 O. L. 449, 452, §3)

§5411-1. "[*Day for listing and assessing taxable deposits fixed by commission; notice of action.*] On or before the fifth day of December annually, the tax commission of Ohio shall fix the day as of which the taxable deposits in financial institutions shall be listed and assessed. The day so fixed shall be between the first and thirtieth days of November both inclusive and the action of the commission shall be taken not more than five days after the day so fixed. Notice of such action shall be immediately given to each financial institution and to the auditor of each county by registered mail, and the date so fixed shall be printed or stamped on the forms of return to be made by all financial institutions. The dates herein fixed for the action of the commission are directory merely, and if through inadvertence or mistake such action is not taken at the time herein prescribed, or the notice herein required to be given to a financial institution or a county auditor is not duly given, the remaining requirements of this chapter and the validity of any assessment made hereunder shall not be affected thereby." (114 O. L. 714, 748, §3)

§5411-2 "*Report of financial institution; contents.* The report of each financial institution made pursuant to section 5411 of the General Code shall also show the aggregate balances of the taxable deposits of its depositors, in each county in which the institution maintained an office or offices for the receipt of deposits, at the end of business on the day fixed by the board of tax appeals pursuant to section 5411-1 of the General Code. The report shall show also the names and addresses of all depositors whose deposits were wholly withdrawn from such institution between the day so fixed and the date on which notice of the fixing thereof was received by such institution, or if no such notice was received, then between the day so fixed and the first day of January next following, and the amount of the taxable deposits of each such depositor on the day so fixed." (122 O. L. 375, §1)

§5412 *"Tax commissioner to ascertain and assess all taxable shares and capital of financial institution; depositors to be assessed, when.*

"Upon receiving such report the tax commissioner shall ascertain and assess all the taxable shares of such financial institution, or the value of the property representing the capital employed by such financial institution, not divided into shares, at the aggregate amount of the capital, the surplus or reserve fund and the undivided profits as shown in such report, and the amount of taxable deposits of such institution in each county in which the institution maintained an office or offices for the receipt of deposits. Such amounts shall be assessed in the name of such financial institution excepting that the amounts of the taxable deposits wholly withdrawn from each such institution within the times mentioned in section 5411-2 of the General Code and separately set forth in such report shall be subtracted from the amount of taxable deposits so assessed and separately assessed in the names of such respective depositors. In the case of an incorporated financial institution all of whose shares constitute deposits as defined in section 5324 of the General Code such assessment of shares shall exclude the capital stock thereof as so shown but shall include the surplus or reserve and undivided profits so shown." (122 O. L. 375, 376, §1)

§5412-1 *"Certification of assessment of financial institution to auditor of state; certification of assessment of depositors to county auditors; amounts placed on tax lists; certificate of abatement.*

"On or before the first Monday of May, annually, the tax commissioner shall certify to the auditor of state the assessment of each financial institution located in the state, showing separately the county in which the institution's principal office is located, and the amount or amounts of taxable deposits, if any, of branches in each county other than that in which such principal office is located, and to each county auditor the assessment of each taxable deposit separately assessed in the name of a depositor residing in his county. The auditor of state shall place the amount or amounts so

certified on the intangible property tax list in his office. The county auditor shall place the amounts so certified on the classified tax list and duplicate of his county in the names of the depositors represented by such certificates.

"Any certificate of abatement issued pursuant to section 1464-3 of the General Code for the overpayment of the deposits tax or taxes imposed on shares of financial institutions or on capital employed by financial institutions may be tendered by the payee or transferee thereof to the treasurer of state as payment for any taxes allocable to the county in which the claim for overpayment arose." (124 O. L. 64, 66)

§5638-1 "*Tax levy on property on intangible property tax list; rates.* Annual taxes are hereby levied on the kinds and classes of intangible property, hereinafter enumerated, on the intangible property tax list in the office of the auditor of state and duplicate thereof in the office of treasurer of state at the following rates, to-wit:

"* * * deposits, two mills on the dollar; shares in and capital employed by financial institutions, two mills on the dollar; * * *." (120 O. L. 115, 117, §1)

§5673-1 "[*Taxes a lien on deposits and shares of stock of financial institution; payment.*]

"Taxes assessed on deposits in a financial institution in this state shall be a lien on the deposit of each person as of the day fixed by the tax commission of Ohio for the listing of such deposits. Taxes assessed on the shares of stock of such an institution, all of whose shares are withdrawable and defined as deposits in chapter four of this title, shall be a lien on such shares so defined as deposits as of the day so fixed. It shall be the duty of every financial institution to pay the taxes on the amount of such deposits and/or withdrawable shares assessed in its name to the treasurer of state and any such institution failing to pay such taxes as herein provided shall be liable by way of penalty for the gross amount of the taxes due on and with respect to all its deposits and withdrawable shares assessed in its name and for an additional amount of one hundred dollars for every

day of delay in the payment of such taxes." (115 O. L. 595, §1)

§5673-2 *"Financial institution may deduct taxes from deposits, interests or dividends, how and when; lien; enforcement of lien.*

"A financial institution so required to pay to the treasurer of state the taxes assessed upon its deposit accounts, as taxable property of its depositors, and or upon its withdrawable shares as taxable property of its shareholders respectively, as provided in the next preceding section, may, upon receipt of notice of the day fixed for the listing of such deposits, charge the amount thereof to and deduct the same from the deposit of each depositor, or from the interest that is due or thereafter becomes due thereon, or from the dividends that are due or thereafter became due thereon, as the case may be, and shall have a lien upon such deposit, interest and/or dividends and on all funds in its possession belonging to such depositor or shareholder, or which may at any time come into its possession, for reimbursement of the taxes so payable, with legal interest. Such lien may be enforced in any appropriate manner at any time within six months after the payment of the taxes to the treasurer." (115 O. L. 595, §1)

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Appellee.

BRIEF IN REPLY TO STATEMENT IN OPPOSITION TO JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

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In his statement in opposition to appellant's statement of jurisdiction and motion to dismiss or affirm, the appellee (hereinafter called the "Tax Commissioner") adopts by reference a similar statement filed in the case of **Society**

for Savings in the City of Cleveland v. John W. Peck, Tax Commissioner of Ohio (No. 204, October Term, 1954).

The majority opinion in the state court in **Society for Savings** (161 O. S., 122), cites and quotes from a number of decisions of this court distinguishing between the capital, or moneyed capital, or property representing capital of the corporation on the one hand and the capital stock issued by the corporation and owned by its shareholders on the other and then loses the distinction in a maze of semantics. It goes on to reverse the distinction and propound that the Ohio statutes in using the words "capital employed or the property representing it, in" or the words "the value of the property representing the capital employed by" the financial institution does not mean capital of the institution or value of property representing capital of the institution, but the capital stock held by the depositors therein. This disregards the fact that when a deposit is made in a financial institution it loses its identity as capital of the depositor and becomes capital employed by (or capital employed in) the institution; i.e., the capital of the institution itself, and in exchange therefor the depositor receives a passbook, which evidences a credit account in the amount of the deposit. Those passbook or credit accounts are taxed as deposits and are neither capital stock nor capital under the tax laws. Accordingly, the only capital employed in or by the institution is the capital of the institution and the only property representing it is the property of the institution; i.e., its real estate, bonds, notes and mortgages, furniture and fixtures and other assets. Furthermore, the majority opinion loses sight of the fact that since Society for Savings and First Federal have no outstanding capital stock or shares other than deposits, the capital taxed by these provisions or property representing it is limited to that meas-

ured by the reserves and undivided profits, which the depositors never paid in or owned and was never the capital of the depositors but which was accumulated from earnings of the institution.

The depositors have no ownership interest in the reserves, which are held for the sole purpose of meeting losses as appears (Stipulation 4) from the rules and regulations governing Federal Savings and Loan Associations:

> "Section 147.7 General reserves.—The term 'general reserves' means the aggregate amount of reserves of a Federal association established by such association for the sole purpose of meeting losses. Any amount in a reserve for bad debts which is exclusively for bad debt losses, shall be deemed to be a part of the General Reserves and to be a part of the reserve for losses provided in the Charters of Federal associations which have a Charter E or a Charter K."

and from the rules governing insurance of accounts therein (Stipulation 4)

> "Section 163.11 Setting up, designation, and purpose of Federal Insurance reserve.—Each insured institution shall set up a Federal insurance reserve account which shall be used solely for the purpose of absorbing losses. No insured institution may pay dividends from its Federal insurance reserve account. * * * The general reserves of Federal savings and loan associations operating under Charter K or Charter N are deemed to meet the requirements of this section. Any amount in a reserve for bad debts, which is exclusively for bad debt losses, shall be deemed to be a part of the Federal Insurance Reserve."

The position of the Tax Commissioner and the reasoning of the state court disregard and are directly contrary to regulations promulgated by the Federal Home Loan Bank Board for the Federal Savings and Loan system whether the statute be read as taxing capital or the property rep-

resented thereby. We quote from these regulations (Stipulation 4):

> "Section 141.3 Capital—The term 'capital' means the aggregate of the payments on savings accounts in a Federal association, plus earnings credited thereto, less lawful deductions therefrom."
>
> "Section 141.4 Savings Account—The term 'savings account' means the monetary interest of the holder thereof in the capital of a Federal association and consists of the withdrawal value of such interest."
>
> "Section 141.6 Withdrawal value—The term 'withdrawal value' means the amount paid on a savings account in a Federal association, plus earnings credited thereto, less lawful deductions therefrom."

Hence, the depositors' capital includes no part of the reserves and undivided profits, which are the measure of the property assessed herein.

The majority and dissenting opinions of the state court as well as the Tax Commissioner's statement in opposition clearly recognize that there is no specific statutory provision for recoupment or reimbursement of the institution for the taxes paid by it if they be paid in behalf of the depositors.

However, in his statement in opposition, the Tax Commissioner argues that the taxpayer has an implied right of recoupment or reimbursement, indeed a right of assessment against its depositors "to make up any losses sustained by the enterprise." This is directly contrary to the last sentence of paragraph 6 of First Federal's charter (Appellant's Exhibit No. 4) which we quote—

> "* * * All share accounts shall be nonassessable, and no holder thereof shall be responsible for any losses incurred by the association beyond the loss of the participation value of his share accounts at the time the loss is determined."

The majority opinion in the state court does not overcome the authority of **Home Savings Bank v. Des Moines**, 205 U. S., 503. That case involved a state law taxing shares of stock in banks measured by capital, surplus and undivided earnings and requiring state banks to pay the tax without providing for recovery or reimbursement from the shareholders. This court said in its opinion:

> (p. 510) "A superficial reading of the law would lead to the conclusion that the tax authorized by it is a tax upon the shares of stock. The assessment is expressed to be upon 'shares of stock of state and savings banks and loan and trust companies.' But the true interpretation of the law cannot rest upon a single phrase in it. All its parts must be considered in the manner pursued by this court in New Orleans v. Houston, 119 U. S. 265, 278, and Home Insurance Co. v. New York, 134 U. S. 594, with the view of determining the end accomplished by the taxation, and its actual and substantial purpose and effect. We must inquire whether the law really imposes a tax upon the shares of stock as the property of their owners, or merely adopts the value of those shares as the measure of valuation of the property of the corporation, and by that standard taxes that property itself."

The court held that in substantial effect the law imposed a tax upon the property of the bank itself and since that property included government bonds was void. Referring to **Weston v. Charleston**, 2 Pet., 449; **Bank of Commerce v. New York City**, 2 Black, 620, and **Bank Tax Case**, 2 Wall., 200, it said:

> (p. 515) "The case at bar cannot be distinguished in principle from these cases. In the first case the tax was on the capital stock at its actual value; in the second case on the amount of the capital stock and the surplus earnings, and in the case at bar on the shares of the stock, taking into account the capital, surplus and undivided earnings. It would be difficult for the

> most ingenious mind and the most accomplished pen to state any distinction between these three laws, except in the manner by which they all sought the same end—the taxation of the property of the bank. The slight concealment afforded by the omission of the property **eo nomine** is not sufficient to disguise the fact that in effect it is the property which is taxed. If included in that property it is discovered that there is some which is entitled by Federal right to an immunity, it is the duty of this court to see that the immunity is respected."

In the **Home Savings Bank** case, as in this, the state court had based its opinion upon the view that even though the tax was assessed against the corporation measured by the value of its capital stock without provision for reimbursement, it was equivalent in substantial effect to a tax upon the shareholders in respect of their shares because, being paid by the bank, the ultimate burden is, in effect, distributed upon the shareholders in proportion to their holdings. This court disposed of that argument by saying in part:

> (p. 519) "One other consideration only needs to be noticed. It is said that where a tax is levied upon a corporation measured by the value of the shares in it, it is equivalent in its effect to a tax (clearly valid) upon the shareholders in respect of their shares, because, being paid by the bank, the burden falls eventually upon the shareholders in proportion to their holdings. It was upon this view that the lower court rested its opinion."
>
> * * * * * * * * *
>
> (p. 520) "Moreover, it may be said that, if given the effect claimed, the consideration that the ultimate burden of the tax is distributed upon the shareholders in proportion to their holdings, would have saved the taxes condemned in the Bank of Commerce case and the Bank Tax case, and indeed all taxes assessed upon the property of corporations, and the immunity from state tax of United States bonds owned by corporations would indirectly be absolutely destroyed."

In **Farmers Bank v. Minnesota**, 232 U. S., 516, this court held that bonds (issued by a municipality in Indian Territory) exempt from taxation under the Federal Constitution may not be included as assets in ascertaining the surplus of the corporation owning them for the purpose of imposing a tax thereon. The court said (p. 528):

> "It results that the inclusion of the bonds now in question in the list of the assets of plaintiff in error, in ascertaining its surplus for the purpose of imposing a state property tax thereon, was repugnant to the Constitution of the United States."

The law involved in **Des Moines National Bank v. Fairweather**, 263 U. S., 103, 105, 44 S. Ct., 23, cited by the Supreme Court of Ohio (161 O. S., 122, 133) specifically assessed a tax on shares against the several shareholders not, as in the case at bar, against the financial institution itself. We quote (p. 105):

> "The facts may be shortly stated. No assessment was made against the bank, save of its real property."

The text of the law as quoted 263 U. S., 103 at p. 108 and 44 S. Ct., 23 at p. 25 reads:

> "Shares of stock of national banks and state and savings banks, and loan and trust companies, located in this State, shall be assessed to the individual stockholders at the place where the bank or loan and trust company is located. * * *"

The law went on to provide for payment of the tax in the first instance by the bank with ample provision for enforcing reimburement from the shareholders; it also specifically provided that except for the tax on real estate of the bank, "the property of such corporation shall be otherwise as-

sessed." In contrast with this, our statute (G. C. Section 5409) provides:

> "The real estate of a financial institution shall be taxed in the place where it is located, in like manner as the real estate of persons is taxed; but the tax provided for in this chapter shall be in lieu of all other taxes on the other property and assets of such institution."

In the case at bar, the Tax Commissioner considered and treated the taxes involved as taxes upon the property of First Federal. The captions of the tax bills (Appellant's Exhibits 5, 6, 7, 8 and 9) contained the number of the year followed by the words **"tax bill for personal property of financial institution."**

The statement of the Tax Commissioner and the interpretation set forth therein of the majority opinion of the state court assume "the complete identity of the bank and its depositors." If that is the proper construction of the holding of the state court, then it matters not whether the law is construed as imposing the tax upon the institution itself or upon the depositors on account of their so-called ownership interests therein; since the institution and its depositors are identical, the tax is imposed upon the property of the institution, including Federal securities, or upon the depositors' aliquot portions of the ownership interests therein, and the law may not be sustained but is repugnant to the Constitution and to the laws of the United States.

Respectfully submitted,

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STANLEY J. BOWERS (SUCCESSOR TO JOHN W. PECK) TAX COMMISSIONER OF OHIO

STATEMENT IN OPPOSITION TO APPELLANT'S STATEMENT OF JURISDICTION AND MOTION TO DISMISS OR AFFIRM

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1. *Issues Presented on Appeal*

This case is a companion case to *Society for Savings* v. *Peck*, No. 33,523, Supreme Court of Ohio, No. —— Supreme Court of the United States, reported below in 161 Ohio State, 122. The opinion of the Supreme Court of Ohio in this case referred to the *Society for Savings* case, and relied on that opinion. The instant case is reported below in 161 Ohio State, 149.

Society for Savings v. *Peck* has been appealed to this Court, No. 204, October Term, 1954, Counsel for the Tax Commissioner in that case have filed a Statement in Opposition to Appellant's Statement of Jurisdiction with appropriate citations of authorities. Counsel for the Tax Commissioner in the instant case refer to their statement in the *Society for Savings* case and rely upon it here.

WHEREFORE, the Tax Commissioner moves that the appeal herein be dismissed or the order of the Supreme Court of Ohio be affirmed.

Respectfully submitted,

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Tax Commissioner of Ohio,

Appellee.

BRIEF OF APPELLANT.

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BRIEF OF APPELLANT.

REFERENCES TO OPINIONS BELOW.

The per curiam and dissenting opinions in the Supreme Court of Ohio (R. 18, 21) are reported in 161 O. S. 149, 152, 53 O. O. 66 and 118 N. E. 2d 667. Only the first paragraph of the per curiam opinion relates to the issues before this Court; it refers to and adopts the reasons given in support of the judgment in the companion case of *Society for Savings in the City of Cleveland v. Peck, Tax Commissioner,* here on appeal in October Term, 1954, No. 204.* The majority and dissenting opinions in that case (No. 204, R. 30, 48) are reported in 161 O. S. 122, 143, 53 O. O. 53 and 118 N. E. 2d 651.

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* References to pages of the printed Transcript of Record in that case will be indicated by the abbreviation "No. 204, R. ____."

STATEMENT OF GROUNDS ON WHICH JURISDICTION OF COURT IS INVOKED.

Jurisdiction of the Supreme Court of the United States to review upon appeal in the instant case is conferred by Title 28, § 1257, (2), (3), 2101 (c), 2103. Probable jurisdiction on appeal was noted by order of the Court dated October 14, 1954 (R. 56).

The judgment of the Supreme Court of Ohio was entered March 10, 1954, Application for Rehearing denied March 31, 1954 (R. 30, 31) and the Order Allowing Appeal entered June 23, 1954 (R. 4, 30).

The statutes of Ohio providing for the assessment and collection of intangible taxes on personal property of financial institutions were construed and applied by the judgment of the Supreme Court of Ohio so as to tax Appellant upon account of its property representing surplus, or reserves and undivided profits for the years involved at the full book value thereof without deduction of the amount of United States Government bonds (including principal and interest) and stock in Federal Home Loan Bank (a Federal Government instrumentality) held by Appellant. The statutes of Ohio so construed and applied to Appellant invade the fiscal powers reserved to the Federal Government and are repugnant to the Constitution Article I, Section 8 and laws Tit. 31 U. S. C. § 742, Tit. 12 U. S. C. § 1433, of the United States. (*Infra* p. 42.)

The statutes of Ohio are repugnant to the Fourteenth Amendment to the Constitution for other reasons.

The majority opinion of the State Court construed the statutes as imposing a tax upon the depositors of the institution upon account of their ownership interests in the property representing surplus, or reserves and undivided profits and requiring the Appellant to pay such taxes without provision for reimbursement as distinguished from the

provision for tax upon the deposits themselves for reimbursement of which provision is made.

Since no provision for reimbursement of Appellant was made, it was thereby deprived of property without due process of law and denied the equal protection of the laws.

In similar taxation against unincorporated banks, the deduction of Federal securities from the tax base must be permitted; in comparison with that case Appellant is denied the equal protection of the laws.

Since the depositors had already been taxed upon the face value of the amount credited to their respective accounts (i.e. the amount withdrawable from their pass book accounts), such taxation of the depositors constitutes discriminatory double taxation and denial of the equal protection of the laws.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

The case involves the Constitution of the United States, Article 1, Section 8 and Section 1 of the Fourteenth Amendment; United States Code Tit. 31 § 742 (R. S. § 3701) and Tit. 12, § 1433.

It also involves the statutes of Ohio relating to intangible personal property taxes on financial institutions on account of property representing capital employed by them measured in Appellant's case by reserves and undivided profits, particularly G. C. §§ 5324, 5328-1, 5406, 5407, 5408, 5409, 5410, 5411, 5411-1, 5411-2, 5412, 5412-1, 5414-2, 5638-1, 5673-1, and 5673-2.

All references are to the General Code applicable in this case—not to the Revised Code which has since become effective.

The pertinent text of the provisions cited is set forth in the Appendix, *infra* pp. 42-50.

QUESTIONS PRESENTED FOR REVIEW.

Whether the incidence of the intangible property tax imposed by the statutes of Ohio upon property of incorporated financial institutions having no capital stock or shares (other than withdrawable shares which are classed as deposits by the law, G. C. § 5324) measured by the book value of property representing surplus, or reserves and undivided profits, is upon the financial institution and its property or upon its depositors.

If the incidence of the tax is upon the institution—

(a) Whether the Statutes are not repugnant to the Constitution, Art. I, Sec. 8 and laws, U. S. Code Tit. 31 § 742 and Tit. 12, §1433, of the United States since deduction of the value of U. S. bonds and stock in Federal Government instrumentalities was denied.

(b) Whether the statutes so construed are not repugnant to the Fourteenth Amendment since they result in denial of the equal protection of the laws—the protection necessarily accorded to unincorporated banks permitting deduction of the value of Federal securities.

If the incidence of the tax is upon the depositors—

(a) Whether the statutes are not repugnant to the Fourteenth Amendment since the tax was paid by Appellant without provision for reimbursement thereby depriving Appellant of property without due process of law.

(b) Whether by discriminatory double taxation on the depositors with respect to the same property the statutes are not repugnant to the Fourteenth Amendment.

STATEMENT OF THE CASE.

This case is before the Court on appeal from a judgment of the Supreme Court of Ohio (R. 31) reversing an order (R. 6-17) of the Board of Tax Appeals (hereinafter called the "Board") of the State of Ohio, which reversed an order (R. 34) of the Tax Commissioner of Ohio (herein-

after called "Commissioner") and ordered allowance of an Application for Certificate of Abatement (R. 32) of intangible personal property taxes assessed against Appellant as a financial institution for the years 1947-1951 both inclusive.

This appeal involves the constitutionality and conflict with Federal statutes of statutes of Ohio construed by the Supreme Court of Ohio to permit taxation of property of Appellant representing its reserves and undivided profits without deduction of United States bonds and Federal Home Loan Bank stock owned by it.

Appellant has no stock other than withdrawable shares which are in fact and law savings deposits. The taxes were levied against Appellant measured by book value of its net assets including Federal securities owned by it, were paid by Appellant, and there is no provision for reimbursement therefor.

In each of the years involved, Appellant owned United States bonds and Federal Home Loan Bank stock, the book value of which exceeded the net book value of the property of the institution represented by its surplus, or reserves and undivided profits (R. 17).

In accordance with the statutory provision therefor application was filed with the Tax Commissioner of Ohio for abatement of taxes for the years 1947-1951 to allow for the deduction of Federal securities, and denied. Thereupon, appeal was taken to the Board which reversed the order of the Commissioner insofar as such order had denied the deduction of the amount of United States bonds and Federal Home Loan Bank stock from the amount of surplus or reserves and undivided profits, property of Appellant.

Appeal was taken by the Commissioner to the Supreme Court of Ohio which reversed the decision of the Board insofar as it was favorable to First Federal. Appli-

cation for rehearing was duly filed in the Supreme Court and denied (R. 21, 30).

The holdings of the Commissioner, Board and State Court with respect to the tax on deposits (as distinguished from the tax on property representing reserves and undivided profits) are not in issue herein.

No procedural questions are involved herein, all returns, claims for refund and abatement and notices of appeal having been duly and regularly filed and the taxes paid within the times required by law (Stipulation 9—R. 42).

Appellant is a Federal Savings and Loan Association incorporated and existing under the Home Owners Loan Act of 1933 as amended (Title 12 U. S. C. § 1464, *et seq.*) and having its place of business in Warren, Ohio. It is an incorporated financial institution located in Ohio, originally incorporated in 1922 as The Warren Savings and Loan Association and converted to a Federal Savings and Loan Association in 1936 (Stipulation 1—R. 37). Its members consist of all holders of savings accounts and all borrowers from Appellant (Exhibit 4, Art. 4 omitted in printing).

Appellant has never had or issued any permanent or non-withdrawable shares of stock. All of the accounts of its shareholders so-called are represented by savings account pass books (in which are entered all deposits, credits and withdrawals) and are deposits within the definition of G. C. § 5324. They are known as savings accounts (Reg. § 141.4—R. 38). The persons owning, holding in trust or having the beneficial interest in such accounts are entitled to withdraw any part or all of the amounts credited to their savings accounts and make deposits therein but are limited to such amounts and are not entitled to withdraw any part of the reserves or undivided profits of the taxpayer (Stipulations 2, 4; Regs. §§ 141.4, 141.6, 163.11—R. 37, 38, 39).

The taxpayer is by its charter (Appellant's Ex. 4—Art. 9) required to maintain general reserves and by regulations (Stip. 4, Regs. § 163.11—R. 39) is required to maintain a Federal insurance reserve account against which losses may be charged so that neither the Federal Savings and Loan Insurance Corporation or the depositors may be endangered by losses.

The forms of tax returns for financial institutions made no provision for deduction of bonds and stocks of the United States and federal instrumentalities and they were not deducted.

SUMMARY OF ARGUMENT.

The taxation of Federal securities (United States bonds and Federal Home Loan Bank stock) invades the fiscal powers reserved by Article I, Section 8 to the Federal government whose power in that field is supreme. This power is the foundation stone of the Federal credit.

Such taxation likewise violates the laws of the United States, 31 U. S. C. § 742 (R. S. 3701) and 12 U. S. C. § 1433.

The Supreme Court of Ohio attempted by its opinion to avoid the encroachment on Federal powers of the Statutes of Ohio, construed by it to permit taxation of Appellant's property without deduction of Federal securities by holding that the tax here in question on property representing capital, measured in this case by reserves and undivided profits, is actually a tax upon what it described as the ownership interests of the depositors in Appellant's property.

The majority opinion cited and quoted from cases differentiating between the property or interest of stockholder in an incorporated institution commonly called "shares," or the aggregate of such interests commonly

called "capital stock" on the one hand from the "capital" or "moneyed capital" or "property employed" with which the institution does business. It recognized that the State cannot levy a property tax against the corporation on its capital or on its net worth without excluding Federal securities in the computation of such capital or net worth; that the corporation is the legal owner of all of the property of the institution, real and personal, but went on in spite of such language to hold that the word "capital" or "property representing capital" in a financial institution used in the statutes did not mean the capital of the institution; but that the "capital employed in" or "by" the institution meant instead the capital stock or shares of the individual owners of the institution, which it said are the depositors since the institution has no permanent stock.

This Court is not bound by the State court's determination of the incidence of the tax. Its concern is with realities not nomenclature; with substance rather than form; in short, with the real nature, operation, practical effect and actual incidence of the tax.

The taxing statutes of Ohio provide in a single chapter a comprehensive plan for personal property taxation of financial institutions of various types, dealers in intangibles and domestic insurance companies with substantial uniformity of general effect. In the case of financial institutions each section covers such institutions of all types.

In the case of deposits which by the law of Ohio includes all savings accounts and so-called withdrawable shares, the tax is imposed upon the book value, the amount which may be withdrawn in each case. In the case of deposits in nonresident institutions, whether mutual savings banks, Federal or state savings and loan associations and others, the return is made and the tax assessed against

and paid by the individual depositor himself, and is based upon the book value of the account. In the case of resident institutions, the institution itself is required to make an overall return of deposits and to pay the tax but is given a lien upon the account and a right to recover it by charging the tax against the account.

In the case of incorporated institutions having permanent stock, the shares or capital stock are taxed at the value of the capital and surplus or reserves and undivided profits, but in the case of institutions whose capital stock is not divided into shares or all of whose shares are deposits, the tax is upon the property representing the capital employed, measured by the capital and surplus, or reserves and undivided profits.

Deposits are listed at their amounts as of a date in November fixed by the Board of Tax Appeals in each year whereas in the case of capital or property representing capital the listing is as of December 31 preceding the year in which the tax is assessed.

The taxes in issue here were levied against Appellant on the net book value of its property representing capital employed measured by its reserves and undivided profits. The taxes were paid by Appellant and there is no provision in law for reimbursement of Appellant therefor. The legal incidence of a tax accordingly, was on the Appellant and its property, not on its depositors. The tax on deposits was separately assessed and paid. The depositors are neither the legal nor beneficial owners of, and have no interest in, any part of its surplus or reserves and undivided profits. They may only withdraw the amounts credited on their pass book accounts. The reserves are for the sole purpose of meeting losses. Accordingly, the incidence of the tax cannot be upon the depositors. Again, there is no provision for reimbursement of the Appellant

or recoupment from its depositors for the taxes paid on account of its reserves and undivided profits. This is fatal to the proposition that the tax is against the depositors on account of their implied interest in reserves and undivided profits or property of the institution represented thereby.

If we are correct in our position that the incidence of the tax here involved is upon Appellant and its property, then clearly the statutes construed to permit such tax without deduction of Federal securities is repugnant to the Constitution and to the laws of the United States.

The statutes so construed not only invade the fiscal powers of the Federal government but result in deprivation of property without due process of law and in the denial of the equal protection of the laws by reason of the fact that in the case of unincorporated institutions the shareholders, partners or owners and the institution are identical and must be permitted to deduct Federal securities from the tax base.

Deprivation of property without due process and denial of equal protection result even if the incidence of the tax is on the depositors since (a) the Appellant was required to pay it without provision for reimbursement and (b) since the tax on depositors in nonresident institutions of the same sort and in institutions located anywhere having permanent stock will be limited to the face value of their accounts.

ARGUMENT.

Taxation by State of Federal Securities is Repugnant to the Constitution and Laws of the United States.

The taxation of bonds and stock of the United States and of Federal instrumentalities invades the fiscal powers reserved to the United States by Article I, Section 8 of the Constitution of the United States.

McCulloch v. Maryland, 4 Wheat. 316 (1819);
Weston v. Charleston, 2 Pet. 449 (1829);
Banks v. The Mayor, 7 Wall. 16, 24 (1868).

A statute of the State of New York, passed in 1857, enacted that the capital stock of banks of the State "should be assessed at its actual value and taxed in the same manner as other personal and real estate of the country." This was held unconstitutional since it did not exempt the value of stock of the United States held by the bank.

Bank of Commerce vs. New York City, 2 Black 620, 629 (1862):

> "1. Stock of the United States is not subject to taxation under the laws of a state.
>
> 2. A State law for that purpose is unconstitutional, whether it imposes the tax on United States stock *eo nomine*, or includes it in the aggregate of the taxpayer's property, to be valued, like the rest at its worth.
>
> 3. A tax on the nominal capital of a bank, without regard to the nature or value of the property composing it, is annexed to the franchise as a royalty for the grant, and not a burden imposed on the property itself.
>
> 4. But the law of New York taxes the capital of banks according to its valuation, and the property which constitutes it is subject to taxation or entitled to exemption therefor, like similar property held by individuals."

Referring to the case of *Weston v. Charleston, supra*, the Court said (p. 629):

> "It has been argued, however, that the form or mode of levying the tax under the ordinance of the City of Charleston was different from that of the law of New York, and hence may well distinguish the case and its principles from the present one. This difference consists in the circumstance that the tax in the former case was imposed on the stock, *eo nomine*, whereas in the present it is taxed in the aggregate of the taxpayer's property, and to be valued at its real worth in the same manner, as all other items of his taxable property. The stock is not taxed by name, and no discrimination is made in favor or against it, but is regarded like any other security for money or chose in action."

The New York statute was then amended to base the tax upon the amount of capital stock paid in or secured to be paid in and this in turn was held unconstitutional.

Bank Tax Case, 2 Wall. 200 (1864):

> "A tax laid by a State on banks, 'on a *valuation* equal to the amount of their capital stock paid in, or secured to be paid in,' is a tax on the property of the institution; and when the property consists of stocks of the Federal Government, the law laying the tax is void." (p. 200)

> "A statute of the state of New York, passed in 1857, making some modifications of previous acts of 1823, 1825 and 1830, enacted that the *capital stock of the banks of the State should be 'assessed at its actual value*, and taxed in the same manner as other personal and real estate of the country.'"

In that case the Court observed (pp. 208-209) that

> "When the capital * * * thus invested is made the basis of taxation of the institutions, there is great difficulty in saying that it is not the stock thus constitut-

> ing the corpus or body of the capital that is taxed. It is not easy to separate the property in which the capital is invested from the capital itself. * * * The legislature * * * when providing for a tax on * * * capital at a valuation * * * could not but have intended a tax upon the property in which the capital had been invested. * * * such is the practical effect of the tax * * *."

The last statement was quoted with approval in *New Jersey Realty Title Ins. Co. v. Div. of Tax Appeals*, 338 U. S. 665, 672-673, 70 S. Ct. 413, 417.

Referring to *Weston v. Charleston*, 2 Pet. 449, and *Bank of Commerce v. New York City*, 2 Black 620, this Court said in *Home Savings Bank v. Des Moines*, 205 U. S. 503, 515:

> "The case at bar cannot be distinguished in principle from these cases. In the first case the tax was on the capital stock at its actual value; in the second case on the amount of the capital stock and the surplus earnings, and in the case at bar on the shares of the stock, taking into account the capital, surplus and undivided earnings. It would be difficult for the most ingenious mind and the most accomplished pen to state any distinction between these three laws, except in the manner by which they all sought the same end—the taxation of the property of the bank. The slight concealment afforded by the omission of the property *eo nomine* is not sufficient to disguise the fact that in effect it is the property which is taxed. If included in that property it is discovered that there is some which is entitled by Federal right to an immunity, it is the duty of this court to see that the immunity is respected."

State of Missouri v. Gehner, 281 U. S. 313 (1930), 50 S. Ct. 326, involved a State tax on the net value of assets of insurance companies deducting Federal securities from

gross assets so as only partially to be reflected in net assets. The Court said (pp. 320-321)—

> "It is elementary that the bonds or other securities of the United States may not be taxed by state authority. That immunity always has been deemed an attribute of national supremacy and essential to its maintenance. The power of Congress to borrow money on the credit of the United States would be burdened and might be destroyed by state taxation of the means employed for that purpose. As the tax exempt feature tends to increase and is reflected in the market prices of such securities, a state tax burden thereon would adversely affect the terms upon which money may be borrowed to execute the purposes of the general government. It necessarily follows from the immunity created by federal authority that a State may not subject one to a greater burden upon his taxable property merely because he owns tax-exempt government securities. Neither ingenuity in calculation nor form of words in state enactments can deprive the owner of the tax exemption established for the benefit of the United States."

After the earlier decisions cited above the taxation of Federal bonds or stock of Federal instrumentalities has also been prohibited by Statute. Title 31 U. S. C. § 742 (R. S. § 3701), 12 U. S. C. § 1433.

Rosch v. First Savings and Loan Association, 203 S. W. 2d 1006—

> "Under statute requiring building and loan associations to render property to tax assessor for taxation including value of assets in excess of amounts over specified deductions, the word 'assets' means assets subject to taxation and not exempt and United States bonds, savings stamps and stocks held by Associations in Federal Home Loan Bank are deductible since they are tax exempt by law although not made deductible

specifically under the Statute. Vernon's Annotated Civil Statute Arts. 881a—53, 7162 § 37. Federal Home Loan Bank Act, § 13, 12 U. S. C. A. § 1433; 31 U. S. C. A. § 742."

The taxing statutes should be construed so as to preserve, if possible, the provisions thereof as enacted—*Stephenson & Potter v. Glander*, 35 O. O. 368, 67 N. E. 2d 14, discussed further, *infra*, p. 19.

This Court Is Not Bound by the State Court's Determination of the Incidence of the Tax.

The Court below recognized the principles stated under the caption above. However, the majority opinion (No. 204, R. 30, 34) first attempts to justify the judgment by the proposition that the tax on property representing capital (i.e. surplus, or reserves and undivided profits in the cases of Society for Savings and First Federal) is not a tax upon the institution but upon the ownership interests assumed to be vested in its depositors.

Although the Supreme Court of the United States will generally accept the construction of the state law by the highest court of the state, it will review such a decision where it is unfounded, untenable, without fair or substantial support, essentially arbitrary or a mere device to prevent review of the decision upon the Federal question —*Enterprise Irrigation District v. Canal Co.*, 243 U. S. 157, 164 (Syl.):

"Where the non-federal ground is so certainly unfounded that it may be regarded as essentially arbitrary, or a mere device to prevent a review of the decision upon the federal question, the judgment rests upon the latter and may be reviewed here."

Ward v. County Commissioners, 253 U. S. 17, 22;

Lawrence v. State Tax Com., 286 U. S. 276, 282, 52 S. Ct. 556, 558 (p. 558):

> "Even though the claimed constitutional protection be denied on nonfederal grounds, it is the province of this Court to inquire whether the decision of the State court rests upon a fair or substantial basis. If unsubstantial, constitutional obligations may not be thus avoided."

A strained construction, not warranted by language of the statute cannot be sustained in order to make the law conform to a constitutional limitation—*Yu Cong Eng v. Trinidad*, 271 U. S. 500, 518-519; 46 S. Ct. 619, 623.

The Supreme Court is never bound by the state's characterization or determination of the incidence of the state tax or the form in which the taxing scheme is cast but will determine for itself the real nature, operation, substance and practical effect of the tax where the constitutionality of the tax is in question.

Home Savings Bank v. Des Moines, 205 U. S. 503, 510:

> "* * * The first step useful in the solution of this question is to ascertain with precision the nature of the tax in controversy, and upon what property it was levied, and that step must be taken by an examination of the taxing law as interpreted by the Supreme Court of the State. A superficial reading of the law would lead to the conclusion that the tax authorized by it is a tax upon the shares of stock. The assessment is expressed to be upon 'shares of stock of state and savings banks and loan and trust companies.' But the true interpretation of the law cannot rest upon a single phrase in it. All its parts must be considered in the manner pursued by this court in *New Orleans v. Houston*, 119 U. S. 265, 278, and *Home Insurance Co. v. New York*, 134 U. S. 594, with the view of de-

termining the end accomplished by the taxation, and its actual and substantial purpose and effect. We must inquire whether the law really imposes a tax upon the shares of stock as the property of their owners, or merely adopts the value of those shares as the measure of valuation of the property of the corporation, and by that standard taxes that property itself * * *."

United States, et al. v. Allegheny County, 332 U. S. 174, 184; 64 S. Ct. 908, 914. In that case this Court held that the incidence of a Pennsylvania tax, held by the state court to be a tax on land of Mesta Machine Company, was in substance a tax on machinery owned by the United States and void.

St. Louis S. W. Ry. v. Arkansas, 235 U. S. 350, 362 (p. 362):

"Upon the mere question of construction we are of course concluded by the decision of the state court of last resort. But when the question is whether a tax imposed by a State deprives a party of rights secured by the Federal Constitution, the decision is not dependent upon the form in which the taxing scheme is cast, nor upon the characterization of that scheme as adopted by the state court. We must regard the substance, rather than the form, and the controlling test is to be found in the operation and effect of the law as applied and enforced by the State."

Eureka Pipe Line Co. v. Hallanan, 257 U. S. 265, 42 S. Ct. 101 (p. 101):

"1. Courts—Writ of error lies to state decision that transaction was not interstate commerce.

"A decision by the highest court of a state sustaining a state statute imposing a tax on the gathering of oil by a pipe line company, where the oil was subsequently sent out of the state, is reviewable on writ of

error, though the court held the tax would be invalid if it burdened interstate commerce as defined by the court, but defined interstate commerce so as not to include those transactions, since it is the result reached by the state court, and not its method of reaching that result, which governs."

Carpenter v. Shaw, 280 U. S. 363, 367; 50 S. Ct. 121, 123 (p. 123):

"[6, 7] Where a federal right is concerned we are not bound by the characterization given to a state tax by state courts or Legislatures, or relieved by it from the duty of considering the real nature of the tax and its effect upon the federal right asserted. * * * We think it plain that the tax imposed on the royalty interest of the present petitioners is not a tax on oil and gas severed from the realty, but is, by its very terms, a tax upon the right reserved in them as lessors and owners of the fee. The tax is imposed on the 'royalty interest * * * except such interests of the State of Oklahoma or such royalty interests as are exempted from taxation under the laws of the United States' and is made 'a lien on such interest.' It is in lieu of all other taxes 'upon any property rights attached to or inherent in the right' to the specified minerals and 'upon the mining rights and privileges for the minerals aforesaid belonging to or appertaining to the land."

The tax in the case at bar is in lieu of all other taxes on the other property [than real estate] and assets of the institution—G. C. § 5409 (*infra*, p. 45).

Richfield Oil Corp. v. State Board of Equalization, 329 U. S. 69, 83, 67 S. Ct. 156, 164 (Syl. 7):

"Ruling of California Supreme Court that California Retail Sales Tax Act is an excise tax for privilege of conducting a retail business measured by gross receipts from sales and is not laid upon consumer and

does not become a tax on the sale or because of the sale, being a matter of state law, is binding on United States Supreme Court, but is not determinative of question whether the tax deprives a taxpayer of a federal right, which issue turns not on characterization which state has given the tax, but on its operation and effect. St. Cal. 1935, p. 1253, § 3; p. 1256, § 2; St. Cal. 1933, p. 2602; U. S. C. A. Const. art. 1, § 10, cl 2."

Senior v. Braden, 295 U. S. 422, 429; 55 S. Ct. 800, 802 (reversing 128 O. S. 597) discussed further, *infra* p. 40 (p. 429):

"The validity of the tax under the Federal Constitution is challenged. Accordingly, we must ascertain for ourselves upon what it was laid. Our concern is with realities, not nomenclature."

N. J. Title Insurance Company v. Division of Tax Appeals, 338 U. S. 665, 673, 70 S. Ct. 413, 417, discussed *supra* p. 13, *infra* p. 28.

Stephenson & Potter vs. Glander, 67 N. E. 2d 14, 35 O. O. 368 (1946) is based upon similar statutory provisions contained in the chapter covering financial institutions. We quote from the syllabus—

"5. Taxation—The tax on dealers in intangibles as applied to an unincorporated dealer is on the employed capital of the dealer itself and ultimate incidence of tax is not on shares of stock as property of shareholders as in the case of incorporated dealer."

"6. Taxation—The state may not assess against a corporation or other like entity a tax which is essentially a property tax as distinguished from a franchise, privilege or excise tax, without allowing a deduction for sums invested in securities of the United States, regardless of whether the tax purports to be one laid directly upon the property or upon the capital of such entity."

"8. Taxation—Tax Commissioner had no authority to include as a part of taxable employed capital of unincorporated dealer in intangibles any part of valuation of United States bonds or other non-taxable securities owned by taxpayer by limiting deduction from employed capital to that portion of valuation of such non-taxable securities as was equal to the proportion between value of such non-taxable property and the value of all property of taxpayer. G. C. § 5414-1 et seq., § 5414-2."

Likewise the Attorney General of Ohio has ruled that a tax on domestic insurance companies under similar language in G. C. § 5414-8 et seq. may not validly be imposed upon the entire capital or surplus or net assets without deduction of bonds and stock of the federal government and its instrumentalities.—1932 *O. A. G.*, I, p. 558—

"1. In computing the capital and surplus of a domestic insurance company with capital, or the surplus of such a company without capital, for the purpose of taxation under the provisions of § 5414-8, et seq., of the General Code, so much of the assets as is invested in bonds or other securities of the United States, bonds issued by federal land banks and joint stock land banks, all bonds outstanding on the first day of January, 1913, of the State of Ohio or of any city, village, county or township in said state, or which have been issued in behalf of the public schools of Ohio, which bonds were outstanding on the first day of January, 1913 and all bonds of this state issued for the world war compensation fund must be deducted."

(p. [illegible] 1).

Although, as above noted, the tax on domestic insurance companies is not one laid directly on the property of such companies but is a tax on the capital and surplus of such companies having capital divided into shares, such tax is clearly a property tax as distin-

guished from a franchise or privilege tax or other form of excise taxes. In this view, it is to be noted with respect to the first question presented in your communication and other related questions therein stated, that the capital and surplus or the surplus, as the case may be, of a domestic insurance company can not be taxed insofar as the same is invested in property which the legislature could not legally tax. *New York vs. Tax etc., Commissioners*, 2 Black 260, 17 U. S. (L. Ed.) 451; *Bank Tax Case*, 2 Wall. 200, 17 U. S. (L. Ed.) 793. In Cooley on Taxation (Fourth Edition), Vol. 2, section 888, it is said:

> 'If a tax on capital or capital stock is deemed to be a property tax rather than an excise tax, then of course it cannot be imposed upon such stock so far as represented by property which the state could not lawfully tax, since what is forbidden directly cannot be accomplished indirectly; and such property cannot be indirectly reached by a tax on its capital without deducting the value of the nontaxable property. In other words, in valuing the capital stock, there must be a deduction of the amount represented by such nontaxable property. This includes not only property expressly exempted by the constitution, statute or charter, but also property impliedly exempt from state taxation because of a federal agency,—such as United States bonds or patents,—or because permanently located outside of the state so as not to be subject to the jurisdiction of the state to tax.'

"Giving effect to the rule above stated to the specific questions presented in your communication, it must be held that the legislature in the enactment of a property tax of this kind has no constitutional power and authority to levy a tax upon that part of the capital and surplus of a domestic insurance company which is invested in bonds or other securities of the United States. See also *State of Missouri, ex rel. Missiouri Insurance Company vs. Gehner*, 281 U. S. 313; *North-*

western Mutual Life Insurance Company vs. Wisconsin, 275 U. S. 136."

Analysis of State Statutes.

The taxing statutes of Ohio (*infra* pp. 43-50) provide in a single chapter a comprehensive plan for personal property taxation of financial institutions of various types of organization, dealers in intangibles and domestic insurance companies with substantial uniformity of general effect.

First Federal is a financial institution within the definition of G. C. § 5407.

G. C. § 5406 provides for the return by financial institutions annually of taxable deposits including withdrawable shares defined as deposits in G. C. § 5324 with certain exceptions which are not important to the case at bar.

G. C. § 5408 provides for the listing and assessment of (a) the shares of stockholders in an incorporated financial institution whose capital stock is divided into shares excepting such as are defined as deposits in G. C. § 5324; (b) the shares [i.e. interests] of stockholders [partners] in an unincorporated financial institution, the capital stock of which is divided into shares held by the owners of such institution; and (c) the capital employed or the property representing it, in a financial institution, the capital of which is not divided into shares or which has no capital stock [e.g. Society for Savings and First Federal].

G. C. § 5409 provides for the taxation of real estate of a financial institution as other real estate is taxed but that the tax provided for in this chapter shall be in lieu of all other taxes on the other property and assets of such institution. This is to be distinguished from some other statutes. Cf. *Des Moines Nat. Bank v. Fairweather*, 263

U. S. 103, 109, 44 S. Ct. 23, 25, in which the statute involved, superficially similar, provided for the assessment of real estate as other real estate but that the property of the corporation should not be otherwise assessed.

G. C. § 5411-1 provides for the fixing annually of a day in November as of which taxable deposits shall be listed.

Other assets are listed as of December 31st, preceding the return, under G. C. § 5411.

G. C. § 5412 provides for the assessment of (a) all the taxable shares of financial institutions; or (b) the value of the property representing the capital employed by such financial institution not divided into shares; in each case at the aggregate amount of the capital, the surplus or reserve fund and the undivided profits as shown in the return and the amount of taxable deposits of such institution. In the case of an incorporated financial institution all of whose shares constitute deposits as defined in § 5324 and are accordingly not returnable or taxable as shares, the last sentence of the section provides that such assessment of shares shall exclude the capital stock thereof but shall include the surplus or reserve and undivided profits so shown. The majority opinion (No. 204, R. 41) says that under the first sentence the amounts of withdrawable shares are assessed as deposits and that the last sentence provides for their assessment again as shares at the value of the surplus or reserves and undivided profits.

G. C. § 5638-1 provides for the levy of intangible property taxes (a) upon deposits at the rate of two mills on the dollar; and (b) upon shares in and capital employed by financial institutions at two mills on the dollar.

G. C. §§ 5673-1 and 5673-2 provide that a financial institution paying taxes upon its deposits and shares of

stock shall have a lien thereon for the reimbursement of the taxes so paid by it and may deduct such taxes from deposits, interests or dividends.

No provision is made anywhere for reimbursement of taxes upon capital or surplus and undivided profits in the case of an institution which has no shares other than such as are classed as deposits. (No. 204, R. 42, 49-50.)

Incidence of the Tax Is Upon Appellant and Its Property.

The taxes were levied against Appellant, measured by the book value of its property representing capital employed excluding capital stock (or deposits) but including its surplus, or reserves and undivided profits. They were paid by Appellant and there is no provision in law for reimbursement of Appellant therefor. The legal incidence of the tax was on Appellant and its property, not on its depositors.

Clearly the depositors of the taxpayer are neither legal nor beneficial owners of, and have no interest in, its surplus or reserves and undivided profits. The charter and regulations provide only for the withdrawal of the amounts credited on their pass book accounts and no more; and the reserves are for the sole purpose of meeting losses (Stipulations 2, 4; Regs. §§ 141.4, 141.6, 141.7, 163.11; R. 37, 38, 39).

Incidentally, although it is not in the record, the Federal Home Loan Bank Board has recently prescribed and the Taxpayer has adopted a new form of charter in which the obsolete term "shares" no longer appears but instead the words "savings accounts" are used. Obviously, in the case of institutions without permanent capital but having only deposits (or so-called withdrawable share or savings accounts which however labelled are defined in the law—

G. C. § 5324—as deposits) the assessment against depositors must be limited to the amounts which are withdrawable. These amounts vary from day to day as the depositors make additional deposits or withdrawals from their accounts and as shown in the record (Stip. 10, R. 42) numerically there is a complete turnover in the accounts on the average by closing of old accounts and opening of new accounts approximately every three years or about one-third of all accounts each year. The reserves are required by law and regulations; and while liquidation is possible, there is no occasion for liquidation and distribution thereof short of losses or business reverses sufficient to wipe out the reserves so as in the opinion of the examining officer no longer to justify the hazard to the public and the Federal Savings and Loan Insurance Corporation of continuing longer in business. In the meantime, such inchoate interest as any depositor might have had in reserves and undivided profits would be lost upon the withdrawal of his deposit or watered down to substantially nothing by increased deposits of others. Society for Savings has been in business for over 100 years and First Federal for 32 with no prospect in any depositor of realizing on any inchoate right in its reserves.

The definition of deposits (G. C. § 5324) includes only the amount which the person owning, holding in trust or having the beneficial interest therein is entitled to withdraw in money. As in *Collett v. Springfield Savings Society*, 13 O. C. C. 131, 143 (affirmed without opinion 56 O. S. 776), so here, the value of the depositor's interest can never rise above par. We quote (Syl. 3)—

> "3. The depositors are required to return and pay taxes upon the value of their interests in the society, and the society to return and pay taxes upon the remainder of the property not the reciprocal of such

interests. The surplus, undivided profits, real estate and furniture do not add to the taxable value of the depositors' interests, and a complete taxation of all the taxable property is effected by requiring the depositors to pay upon the value of their interests and the society to pay upon the surplus, undivided profits, real estate and furniture."

In a similar case an Indiana court held the surplus fund of a mutual savings bank taxable only to the bank—*Beard v. Peoples Savings Bank*, 101 N. E. 325, 327 (1913):

"* * * it does not belong to any particular depositor or class of depositors of the bank * * *. They have no interest in the surplus fund by which they can compel distribution either as a dividend or otherwise * * *. It is apparent we think that the surplus fund in a bank such as this cannot be taxed to the depositors and that if it is taxable at all it must be taxed to the bank."

Farmers and Mechanics Savings Bank v. Minnesota, 232 U. S. 516 (Syl.)—

"Where bonds are exempted from state taxation under the Federal Constitution they cannot be included as assets in ascertaining the surplus of the corporation owning them for the purpose of imposing a state property tax thereon."

(p. 528):

"It results that the inclusion of the bonds now in question in the list of the assets of plaintiff in error, in ascertaining its surplus for the purpose of imposing a state property tax thereon, was repugnant to the Constitution of the United States."

In *Home Savings Bank v. Des Moines*, 205 U. S. 505, 515, this Court held a tax imposed nominally on the capital stock of state and savings banks and loan and trust companies measured by capital, surplus and undivided earn-

ings, assessed against the bank and paid by it as in the case at bar, without provision for reimbursement was in substantial effect a tax on property of the bank and hence repugnant to the Constitution and laws of the United States. (Syl.)

"While the tax on an individual in respect to his shares in a corporation is not a tax on the corporation, and the value of the shares may be assessed without regard to the fact that the assets of the corporation include government securities, if the tax is actually on the corporation although nominally on the shares such securities may not be included in assessing the value of the shares for taxation.

"If a State has not the power to levy a tax it will not be sustained merely because another tax which it might lawfully impose would have the same ultimate incidence.

"The substantial effect of section 1332 of the Code of Iowa providing that shares of stock of state and savings banks and loan and trust companies shall be assessed to such banks and companies and not to the individual stockholders, and that in fixing the value of the shares capital, surplus and undivided earnings shall be taken into account, as the law has been construed by the highest court of the State, is to tax the property of the bank and not the shares of stock, and an assessment which includes government bonds owned by the bank in fixing the valuation of its shares is illegal and beyond the power of the State."

(p. 515):

"* * * The slight concealment afforded by the omission of the property eo nomine is not sufficient to disguise the fact that in effect it is the property which is taxed. If included in that property it is discovered that there is some which is entitled by Federal right to an immunity, it is the duty of the court to see that the immunity is respected."

(pp. 520-521):

"We regret that we are constrained to differ with the Supreme Court of the State on a question relating to its law. But, holding the opinion that the law directly taxes national securities, our duty is clear."

New Jersey Realty Title Ins. Co. v. Div. of Tax Appeals, 338 U. S. 665, 673; 70 S. Ct. 413, 417 involved a statute taxing stock insurance companies on the full value of their property (exclusive of real estate and tangible personal property separately taxed where located, shares of stock owned by such companies, and non-taxable and exempt property) deducting debts and liabilities and certain reserves; provided that the assessment should in no event be less than 15 per cent of the sum of paid-up capital and surplus in excess of all liabilities after deducting the amount of all tax assessments against real estate in the name of the Company.

This Court said—

"It matters not whether the tax is, as appellee contends, an indirect or excise levy on net worth measured by corporate capital and surplus or is, as appellant urges, a tax on personal property based on a valuation gauged by capital and surplus. Our inquiry is narrowed to whether in practical operation and effect the tax is in part a tax upon federal bonds. We can only conclude that the tax authorized by § 54: 4-22, whether levied against capital and surplus less liabilities or against entire net worth, is imposed on such securities regardless of the accounting label employed in describing it."

Analysis of Opinion of State Court.

The majority opinion erroneously construed the words "capital" and "the property representing it" in the Ohio statutes as meaning a part of the interest or claim of the

depositor in or against the institution rather than as describing the property and assets of the institution subject to its liabilities. We submit that the semantics of the majority opinion leads to one conclusion and then jumps to the other. The proper distinction is between the capital stock or shares of, or in, the institution on the one hand and the capital of, employed by, or in, the institution on the other. That distinction is clearly observed in the quotation by the State Court (No. 204, R. 34-35) from *National Bank v. Commonwealth*, 76 U. S. (9 Wall.), 353 and the other opinions from which the court quotes.

The same distinction is found in G. C. § 5408 which provides for the assessment of *shares of stockholders* in a financial institution the capital stock of which is divided into shares, in two different clauses depending on whether the institution is incorporated or unincorporated, and in another clause the *capital employed* or *the property representing it* in an institution the capital of which is not divided into shares or which has no capital stock. The terminology used with respect to the taxation of interests of the shareholders is "shares" or "capital stock," whereas the terminology used with reference to the interests and property of the institution is "capital" or "the property representing it." So in G. C. § 5412 provision is made for the assessment of the taxable shares of the institution in the case of those having capital stock divided into shares (other than deposits) and the value of the property representing the capital employed by the institution in case of an institution whose capital is not divided into shares; and in the case of an incorporated financial institution all of whose shares are deposits as defined in G. C. § 5324, institution is assessed on an amount excluding the capital stock thereof (i.e., the interest of the depositors) but including the surplus or reserve and undivided profits.

This last sentence of G. C. § 5412 does not refer to the case of "shareholders" in an incorporated financial institution of that sort but to the case of "an incorporated financial institution" itself. The deposits are taxed as of a date in November (G. C. § 5411-1, -2), and the capital measured by surplus or reserves and undivided profits (excluding the capital stock or interest of the depositors) are separately taxed as of the close of business on December 31st (G. C. § 5411) preceding the return.

The State court's quotation (No. 204, R. 36) from *Van Allen v. Assessors*, 70 U. S. (3 Wall.) 573, 583, does not support the definition of capital adopted by the State court in the cases at bar. The quotation begins,

> "* * * the tax on the *shares* is not a tax on the *capital* of the bank"

and proceeds in the next paragraph,

> "The interest of the shareholder entitles him to participate in the net profits of the bank in the employment of its *capital* during the existence of its charter, in proportion to the number of his *shares*." (Emphasis ours.)

We do not believe that "on a hasty reading" (No. 204, R. 38) or, *a fortiori*, on a careful reading, the words "capital employed, or the property representing it" found in G. C. § 5408 or the words "value of the property representing the capital employed by such financial institution, not divided into shares" found in G. C. § 5412 may reasonably be argued as describing the interest or claim of depositors in or against the institution. Those words are contrasted with the words "shares" and "capital stock" and, we submit, were used in the statutes with a fair degree of accuracy to express the intention of the legislators. The statutes indicate a rather comprehensive intention to tax

on a comparable basis various property interests in and of financial institutions under a number of varying circumstances. In the case of incorporated institutions having permanent capital stock or shares, a tax is imposed upon those shares, the property interest of the shareholders or stockholders. In the case of an unincorporated association having capital stock divided into shares, the tax is imposed likewise upon the shares but in such instance there is no corporate entity intervening, and the property of the institution is the property of the shareholders therein, regardless of whether it is defined as being held in shares or in fractional interests. The third situation is that of an institution having no shares, the mutuals like Society for Savings and First Federal which have no true shares, but only deposits.

We submit that the terms "capital," "the capital employed by" or "the capital employed in" a financial institution or "the property representing it" are used in the statutes in the case of institutions not having permanent capital stock to describe property owned by the institution, not property interests or claims of individuals in or against the institution. The argument (No. 204, R. 38-39) that the construction contended for by the taxpayers in these cases imputes to the General Assembly the excessive or wasteful use of words, defeats itself. Perhaps it is too much to attribute to the legislature perfection and the most economical use of words and an intent not to use any words which do not describe or apply to something already described or covered. If the minimum use of words were a requisite, G. C. § 5408 and § 5412 might well have been combined and still further condensed to read—

> "All the shares of stockholders in an incorporated financial institution located in this state having capital stock divided into shares, excepting such as are de-

> fined in § 5324 of the General Code as deposits, and the property representing capital, surplus, or reserves and undivided profits in financial institutions which are not incorporated or which have no capital stock other than deposits shall be listed and assessed at the book value thereof and taxed in the manner provided in this chapter."

saving far more than nine words. This is only by way of example. If the interpretation declared by the Court of the aim and meaning of the Legislature were correct, G. C. §§ 5408, 5412, 5638 and 5638-1 might well have been consolidated into a single section levying and assessing a tax of two mills on the dollar against the interests and claims of shareholders, partners, proprietors and depositors in and against the financial institution.

The word "capital" whether used in conjunction with the words "in," "of," "employed by" or "employed in" refers, we submit, to the property which the corporation employs or uses in the transaction of its business. It includes in the case of a financial institution, its office building, the cash on hand and on deposit with other institutions, notes, mortgages, bonds and other property and assets used in carrying on its business subject, of course, to its debts. The capital or property of the institution is generally distinguished from the interests of its shareholders and creditors by the use in describing the latter of the terms "capital stock" or "shares."

When the individual owners, shareholders, or depositors make payment to or deposit in a financial institution the capital or money paid in becomes the capital of the institution. In return, the individuals who paid in or deposited the money receive stock certificates or pass books and become stockholders or depositors. The capital formerly owned by them and paid into the institution is

thenceforth employed by the institution in conducting its business. Regardless of whether it is called the capital in or of the institution, or employed in or by it, the capital is that of the institution and is employed by it in its business. Furthermore, the majority opinion loses sight of the fact that since Society for Savings and First Federal have no outstanding capital stock or shares other than deposits, the capital taxed by these provisions or property representing it is limited to that measured by the reserves and undivided profits, which the depositors never paid in or owned and was never the capital of the depositors but which was accumulated from earnings of the institution.

In *Bank Tax Case*, 2 Wall. 200, 208-209, the court said—

> "* * * The capital is not an ideal, fictitious, arbitrary sum of money set down in the articles of association, but, in the theory and practical operation of the system, is composed of substantial property, and which gives value and solidity to the stock of the institution. It is the foundation of its credit in the business community. The legislature well knew the peculiar system under which these institutions were incorporated, and the working of it; and, when providing for a tax on their capital at a valuation, they could not but have intended a tax upon the property in which the capital had been invested. We have seen that such is the practical effect of the tax, and we think it would be doing injustice to the intelligence of the legislature to hold that such was not their intent in the enactment of the law."

We submit that it is reasonable to impute to the General Assembly an intent to provide for taxing the property of the institution in cases where that is necessary by reason of the form of the institution to equalize the taxation of shares in institutions having permanent stock. It is

only in the cases of the shares in incorporated institutions and deposits that a tax can possibly be assessed on any one other than the institution itself. In case of an unincorporated institution whether or not divided into shares the opinion is in error; no corporate entity intervenes and the property of the shareholders, proprietors or partners is the property of the institution itself whether it be described as shares, capital, capital employed, or property representing it, or aliquot interests therein. In an incorporated institution not having permanent shares or in an unincorporated institution, the taxable equivalent of permanent shares is the capital employed by it—the property of the institution.

Southern Gum Co. v. Laylin, 66 O. S. 578, 596, does not support the proposition for which it is cited (No. 204, R. 38) but rather the contrary. We quote—

> "It is urged, and truly, that the capital paid in by the stockholders becomes invested in property and that taxes are paid thereon the same as individuals pay upon their property."

The statute of Iowa involved in *Des Moines National Bank v. Fairweather*, 263 U. S. 103 (No. 204, R. 40) provided that except for real estate "the property of such corporation shall not be otherwise assessed." As distinguished from that, our G. C. § 5409 provides the tax provided for in this chapter shall be in lieu of all other taxes on the other property [than real estate] and assets of the institution, e.g., it is in lieu of other taxes on personal property of the institution. In cases where there are no permanent shares to tax and discrimination would result from the differences in organization, the chapter imposes a tax upon the property of the corporation, contrary to the statute involved in the *Fairweather* case.

The law involved in that case specifically assessed a tax on shares against the several shareholders not, as in the case at bar, against the financial institution itself. We quote (p. 105):

> "The facts may be shortly stated. No assessment was made against the bank, save of its real property."

The text of the law as quoted 263 U. S., 103 at p. 108 and 44 S. Ct. 23 at p. 25 reads:

> "Shares of stock of national banks and state and savings banks, and loan and trust companies, located in this State, shall be assessed to the individual stockholders at the place where the bank or loan and trust company is located. * * *"

The law went on to provide for payment of the tax in the first instance by the bank with ample provision for enforcing reimbursement from the shareholders.

The majority opinion (No. 204, R. 42-43) dismisses the want of any provision for reimbursement of Appellant by its depositors for the tax on its property representing reserves and undivided profits by saying that the payment will reduce the ultimate value of their property interests in the corporation and in effect reimburse it. The cases cited as holding that reimbursement is not necessary hold that the institution was acting as agent for its stockholders or depositors in paying the tax against them and in *Aberdeen Bank v. Chehalis County*, 166 U. S. 440, 444 there was specific provision for charging or collecting it out of their accounts. Where the institution pays the tax without provision for reimbursement, the incidence of the tax is on property of the institution.

The distinction was made clear in *Home Savings Bank v. Des Moines*, 205 U. S. 503, where a bank had been compelled to pay a tax on the value of its capital shares, with-

out deduction of the United States bonds owned; it was not given a right of reimbursement from the shareholders. The tax was held invalid.

(p. 511):

"* * * Nor can the corporations in the case at bar have by any possibility a common law right to recover the tax paid from the shareholders. The law imposes no obligation on the shareholder. In paying the tax the corporation has paid its own debt and not that of others, and there is nothing in such a payment from which the law can imply a promise of reimbursement. These taxes, therefore, are not to be paid by the banks as agents of their stockholders, but as their own debt, and unless it is supposed that the law requires them to pay taxes upon property which they do not own, the taxes must be regarded as taxes upon the property of the banks."

(p. 519):

"One other consideration only needs to be noticed. It is said that where a tax is levied upon a corporation measured by the value of the shares in it, it is equivalent in its effect to a tax (clearly valid) upon the shareholders in respect of their shares, because, being paid by the bank, the burden falls eventually upon the shareholders in proportion to their holdings. It was upon this view that the lower court rested its opinion."

* * * * *

(p. 520):

"Moreover, it may be said that, if given the effect claimed, the consideration that the ultimate burden of the tax is distributed upon the shareholders in proportion to their holdings, would have saved the taxes condemned in the Bank of Commerce case and the Bank Tax Case, and indeed all taxes assessed upon the property of corporations, and the immunity from

state tax of United States bonds owned by corporations would indirectly be absolutely destroyed."

The Statutes as Construed and Applied by the Supreme Court of Ohio are Repugnant to the Constitution and Laws of the United States.

If the incidence of the tax here involved is upon Appellant and its property as we contend, then the statutes construed to deny the deduction of Federal securities are repugnant to the Constitution, Article I, Section 8 and to U. S. Code, Tit. 31, § 742 and Tit. 12, § 1433, as shown in the first division of the Argument, *supra* pp. 11-15.

We quote further from some of the authorities—

Weston v. Charleston, 2 Pet. 449, 464:

"Congress has power 'to borrow money on the credit of the United States.' The stock it issues is the evidence of a debt created by the exercise of this power. The tax in question is a tax upon the contract subsisting between the government and the individual * * *"

"If the states and corporations throughout the Union possess the power to tax a contract for the loan of money, what shall arrest this principle in its application to every other contract? What measure can government adopt which will not be exposed to its influence?

"But it is unnecessary to pursue this principle through its diversified application to all the contracts, and to the various operations of government. No one can be selected which is of more vital interest to the community than this of borrowing money on the credit of the United States. No power has been conferred by the American people on their government, the free and unburdened exercise of which more deeply affects every member of our republic. In war, when the honour, the safety, the independence of the

nation are to be defended, when all its resources are to be strained to the utmost, credit must be brought in aid of taxation, and the abundant revenue of peace and prosperity must be anticipated to supply the exigences, the urgent demands of the moment. The people, for objects the most important which can occur in the progress of nations, have empowered their government to make these anticipations, 'to borrow money on the credit of the United States.' Can anything be more dangerous, or more injurious, than the admission of a principle which authorizes every state and every corporation in the Union which possesses the right of taxation, to burden the exercise of this power at their discretion?"

Bank of Commerce v. New York City, 2 Black 620, 633:

"The result of this doctrine is, that the exercise of any authority by a State Government trenching upon any of the powers granted to the General Government is, to the extent of the interference, an attempt to resume the grant in defiance of constitutional obligation; and more than this, if the encroachment or usurpation to any extent is admitted, the principle involved would carry the exercise of the authority of the State to an indefinite limit, even to the destruction of power. For, as truly said by the Chief Justice in the case of *Weston v. The City of Charleston*, in respect to the taxing power of the State, 'if the right to impose the tax exists, it is a right which, in its nature, acknowledges no limit, it may be carried to any extent within the jurisdiction of the State or corporation which imposes it, which the will of each State and corporation may prescribe."

Banks v. Mayor, 7 Wall. 16, 23:

"The authority to borrow money on the credit of the United States is, in the enumeration of the powers expressly granted by the Constitution, second in place,

> and only second in importance to the authority to lay and collect taxes. Both are given as means to the exercise of the functions of government under the Constitution; and both, if neither had been expressly conferred, would be necessarily implied from other powers—mentioning no others—to raise and support armies, to provide and maintain a navy, and to carry on war, could be exercised at all; or, if at all, with adequate efficiency."

The same statutory provisions for taxation apply to unincorporated banks as to savings and loan associations without permanent capital (G. C. §§ 5407, 5408, 5412); certainly no one could contend that the tax on capital of unincorporated banks is a tax on anything other than the assets in which it is invested. Their owners, whether called shareholders or partners, are the owners of the property without any intervening corporate entity. In arriving at the tax base of such banks the full value of Federal securities must be deducted. To apply a different rule to a federal savings and loan association would deny it the equal protection of the laws. The statutes so construed would be repugnant to the Fourteenth Amendment to the Constitution of the United States.

If the statutes were properly construed as imposing the tax on the depositors then the requirement that the institution pay the tax without reimbursement would deprive it of property without due process of law and would be repugnant to the Fourteenth Amendment.

The opinion presents an additional basis of unconstitutionality. As construed by the Ohio court, the statutes would impose upon the deposits in each institution two separate taxes, i.e. a tax of two mills on the dollar on the amount of the deposits and another tax of two mills on the dollar on the amount of the capital employed by the finan-

cial institution, i.e. upon the property representing its surplus, or reserves and undivided profits. This is double taxation—two personal property taxes assessed against the same property—and results in depriving the taxpayer of property without due process of law and denying it the equal protection of the laws contrary to the Fourteenth Amendment to the Constitution of the United States. The Supreme Court of the United States in *Senior v. Braden*, 295 U. S. 422, 55 S. Ct. 800 reversing the decision of the Ohio Supreme Court in 128 O. S. 597 held that the Ohio intangible personal property tax upon investments in land trust certificates representing interests in lands which were also subject to real estate taxes was double taxation contrary to the Fourteenth Amendment.

The depositors in Society for Savings and First Federal are no different from savings depositors in banks or savings and loan associations having permanent shares or capital stock—yet the former, under the Ohio decisions herein, would be taxed doubly whereas the depositors in institutions having permanent shares or capital stock would be taxed only upon the withdrawal value of their deposits and this despite the fact that in each case the depositors have the protection of the reserves and undivided profits behind them guarding against any loss. The situation of depositors in Society for Savings and First Federal is identical with that of residents of Ohio having deposits in mutual savings banks and federal savings and loan associations in other states except that in such instances the depositors are required to return such foreign deposits for taxation in their own names and at the face amount of their accounts, the withdrawal value only. This discrimination cannot be justified on the ground that there are two different kinds of property—the deposits on

the one hand and the reserves and undivided profits on the other, for their rights are inseparable. So long as the depositor maintains his deposit, he has the protection of the surplus, reserves and undivided profits; but he cannot withdraw his deposit without losing that protection; hence, if there were any ownership interest coupled with the deposit, the two would constitute only one item of property and not two separate items. No value is added by surplus, reserves and undivided profits and the additional tax on deposits would be confiscatory.

CONCLUSION.

In conclusion it is submitted that the judgment of the Supreme Court of Ohio is erroneous; that such judgment and the statutes of Ohio as construed and applied by it are repugnant to the Constitution and laws of the United States; and that the judgment should be reversed and the Order of the Board of Tax Appeals affirmed, or the cause remanded to the Supreme Court of Ohio for affirmance of such order.

Respectfully submitted,

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APPENDIX.

Constitutional and Statutory Provisions Involved.

Constitution—Article I, Section 8:

The Congress shall have Power * * *

"To borrow Money on the credit of the United States;"

Constitution—Fourteenth Amendment, Section 1:

"* * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

United States Code—Title 31, Section 742:

"*Exemption from taxation.* Except as otherwise provided by law, all stocks, bonds, Treasury notes, and other obligations of the United States, shall be exempt from taxation by or under State or municipal or local authority. (R. S. § 3701.)"

United States Code—Title 12, Section 1433:

"*Exception from taxation; obligation acceptable as credit on debt of home owner.*

"Any and all notes, debentures, bonds, and other such obligations issued by any bank, and consolidated Federal Home Loan Bank bonds and debentures, shall be exempt both as to principal and interest from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States, by any Territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority. The bank, including its franchise, its capital, reserves, and surplus, its advances, and its income shall be exempt from all taxation now or hereafter imposed by the United States, by any Territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority; except that in any real property of the bank shall be

subject to State, Territorial, county, municipal, or local taxation to the same extent according to its value as other real property is taxed. The notes, debentures, and bonds issued by any bank, with unearned coupons attached, shall be accepted at par by such bank in payment of or as a credit against the obligation of any homeowner debtor of such bank. July 22, 1932, c. 522, § 13, 47 Stat. 735; May 28, 1935, c. 150, § 8, 49 Stat. 295."

General Code of Ohio:

§ 5324 " '*Deposits' defined.* The term 'deposits' as so used, includes every deposit which the person owning, holding in trust, or having the beneficial interest therein is entitled to withdraw in money, whether on demand or not, and whether evidenced by commercial or checking account, certificate of deposit, savings account or certificates of running or other withdrawable stock, or otherwise, excepting (1) unearned premiums and surrender values under policies of insurance, and (2) such deposits in financial institutions outside of this state as yield annual income by way of interest or dividends in excess of four per centum of the principal sum so withdrawable." (114 O. L. 714, 716, Section 1)

§ 5328-1 "*Property to be entered on classified tax list and duplicate; exemption.*

"All moneys, credits, investments, deposits, and other intangible property of persons residing in this state shall be subject to taxation, excepting as provided in this section or as otherwise provided or exempted in this title * * *. Such property, subject to taxation, shall be entered on the classified tax list and duplicate of taxable property or on the intangible property tax list in the office of the auditor of state and duplicate thereof in the office of the treasurer of state, as prescribed in this title.

"A corporation shall not be required to list any of its investments in the stocks of any other corporation or in its own treasury stock." (120 O. L. 112, 113)

§ 5406 "*Deposits required to be returned by financial institutions; exceptions.*

"The deposits required to be returned by financial institutions pursuant to this chapter include all deposits as defined by section 5324 of the General Code to the extent that such deposits are made taxable by section 5328-1 of the General Code, excepting deposits belonging to the federal government or any instrumentality thereof; or deposits to the extent of advances or advance payments made under any contract entered into by the federal government or any instrumentality thereof for the production of materials or supplies or the furnishing of services pursuant to authority of any act to further the war effort; or deposits belonging to the state of Ohio or any county, municipality, corporation, school district, township, or other subdivision thereof, or to any other financial institution or to a dealer in intangibles or a domestic insurance company, or to an institution used exclusively for charitable purposes, or proceeds of loans which have been credited to the borrower but not disbursed, or advances by borrowers for the subsequent payment of specific obligations. If any deposit belonging to any of the classes required so to be returned consists in whole or in part of an amount representing uncollected checks and other uncollected items, credited thereto, one-half of the amount so represented shall be considered as withdrawable and to be so included in arriving at the aggregate balance of taxable deposits, required so to be returned, whether or not the depositor is in fact permitted to make withdrawals against the amount so represented and credited." (124 O. L. 156, § 1)

§ 5407 "['Financial institution' defined.] The term 'financial institution' as used in this chapter includes every person who keeps an office or other place of business, in this state, and engages in the business of receiving deposits, and of lending money, buying or selling bullion, bills of exchange, notes, bonds, stocks, or other evidences of in-

debtedness, with a view to profit. * * *" (114 O. L. 714, 747, § 3)

§ 5408 "[*Taxable property of financial institution, how listed, assessed and taxed.*] All the shares of the stockholders in a financial institution, located in this state, incorporated or organized under the laws of the state or of the United States, the capital stock of which is divided into shares, excepting such as are defined as 'deposits' in section 5324 of the General Code, and all the shares of the stockholders in an unincorporated financial institution, located in this state, the capital stock of which is divided into shares held by the owners of such financial institution, and the capital employed, or the property representing it, in a financial institution the capital of which is not divided into shares, or which has no capital stock, located in this state, shall be listed and assessed at the book value thereof, and taxed in the manner provided in this chapter." (115 O. L. 571, § 1)

§ 5409 "*Real Estate of financial institution, how and where taxed.*

The real estate of a financial institution shall be taxed in the place where it is located, in like manner as the real estate of persons is taxed; but the tax provided for in this chapter shall be in lieu of all other taxes on the other property and assets of such institution." (114 O. L. 714, 747, § 3)

§ 5410 "[*Record of names and residence of stockholders and shares of each; inspection.*]

"There shall be kept in the offices at all times where the business of such financial institution is transacted. a full and correct list of the names and residences of the stockholders therein, and the number of shares held by each, which, at all times during business hours, shall be open to the inspection of all officers who are or may be authorized to list or assess such shares for taxation, or to administer the laws relating to such assessment." (114 O. L. 714, 748, § 3)

§ 5411 "*Annual report of resources and liabilities of banks and financial institutions.*

"The cashier or other principal accounting officer of each incorporated bank, the secretary or other principal accounting officer of each other incorporated financial institution, the cashier, manager, or owner of each unincorporated bank, and the manager, owner or owners of each other unincorporated financial institution, shall return to the department of taxation between the first and second Mondays of March, annually, a report exhibiting in detail, and under appropriate heads, the resources and liabilities of such institution at the close of business on the thirty-first day of December next preceding." (124 O. L. 449, 452, § 3)

§ 5411-1 "[*Day for listing and assessing taxable deposits fixed by commission; notice of action.*] On or before the fifth day of December annually, the tax commission of Ohio shall fix the day as of which the taxable deposits in financial institutions shall be listed and assessed. The day so fixed shall be between the first and thirtieth days of November both inclusive and the action of the commission shall be taken not more than five days after the day so fixed. Notice of such action shall be immediately given to each financial institution and to the auditor of each county by registered mail, and the date so fixed shall be printed or stamped on the forms of return to be made by all financial institutions. The dates herein fixed for the action of the commission are directory merely, and if through inadvertence or mistake such action is not taken at the time herein prescribed, or the notice herein required to be given to a financial institution or a county auditor is not duly given, the remaining requirements of this chapter and the validity of any assessment made hereunder shall not be affected thereby." (114 O. L. 714, 748, § 3)

§ 5411-2 "*Report of financial institution; contents.* The report of each financial institution made pursuant to section 5411 of the General Code shall also show the ag-

gregate balances of the taxable deposits of its depositors, in each county in which the institution maintained an office or offices for the receipt of deposits, at the end of business on the day fixed by the board of tax appeals pursuant to section 5411-1 of the General Code. The report shall show also the names and addresses of all depositors whose deposits were wholly withdrawn from such institution between the day so fixed and the date on which notice of the fixing thereof was received by such institution, or if no such notice was received, then between the day so fixed and the first day of January next following, and the amount of the taxable deposits of each such depositor on the day so fixed." (122 O. L. 375, § 1)

§ 5412 *"Tax commissioner to ascertain and assess all taxable shares and capital of financial institution; depositors to be assessed, when.*

"Upon receiving such report the tax commissioner shall ascertain and assess all the taxable shares of such financial institution, or the value of the property representing the capital employed by such financial institution, not divided into shares, at the aggregate amount of the capital, the surplus or reserve fund and the undivided profits as shown in such report, and the amount of taxable deposits of such institution in each county in which the institution maintained an office or offices for the receipt of deposits. Such amounts shall be assessed in the name of such financial institution excepting that the amounts of the taxable deposits wholly withdrawn from each such institution within the times mentioned in section 5411-2 of the General Code and separately set forth in such report shall be subtracted from the amount of taxable deposits so assessed and separately assessed in the names of such respective depositors. In the case of an incorporated financial institution all of whose shares constitute deposits as defined in section 5324 of the General Code such assessment of shares shall exclude the capital stock thereof as so shown but shall include the surplus or reserve and undivided profits so shown." (122 O. L. 375, 376, § 1)

§ 5412-1 *"Certification of assessment of financial institution to auditor of state; certification of assessment of depositors to county auditors; amounts placed on tax lists; certificate of abatement.*

"On or before the first Monday of May, annually, the tax commissioner shall certify to the auditor of state the assessment of each financial institution located in the state, showing separately the county in which the institution's principal office is located, and the amount or amounts of taxable deposits, if any, of branches in each county other than that in which such principal office is located, and to each county auditor the assessment of each taxable deposit separately assessed in the name of a depositor residing in his county. The auditor of state shall place the amount or amounts so certified on the intangible property tax list in his office. The county auditor shall place the amounts so certified on the classified tax list and duplicate of his county in the names of the depositors represented by such certificates.

"Any certificate of abatement issued pursuant to section 1464-3 of the General Code for the overpayment of the deposits tax or taxes imposed on shares of financial institutions or on capital employed by financial institutions may be tendered by the payee or transferee thereof to the treasurer of state as payment for any taxes allocable to the county in which the claim for overpayment arose." (124 O. L. 64, 66)

§ 5414-2 *"Taxable property of dealer in intangibles, how listed, assessed and taxed.*

All the shares of the stockholders in an incorporated dealer in intangibles having an actual place of business in this state, to the extent represented by capital employed in this state, all the shares of the stockholders, partners or members of an unincorporated dealer in intangibles, having an actual place of business in this state, the capital stock of which is divided into shares held by the owners thereof,

to the extent represented by capital employed in this state, or the property representing capital employed in the state by an unincorporated dealer in intangibles whose capital stock is not divided into shares, having an actual place of business in this state, shall be listed and assessed at the fair value thereof and taxed only in the manner prescribed in this chapter."

§ 5638-1 *"Tax levy on property on intangible property tax list; rates.* Annual taxes are hereby levied on the kinds and classes of intangible property, hereinafter enumerated, on the intangible property tax list in the office of the auditor of state and duplicate thereof in the office of treasurer of state at the following rates, to-wit:

"* * * deposits, two mills on the dollar; shares in and capital employed by financial institutions, two mills on the dollar; * * *." (120 O. L. 115, 117, § 1)

§ 5673-1 "[*Taxes a lien on deposits and shares of stock of financial institution; payment.*]

"Taxes assessed on deposits in a financial institution in this state shall be a lien on the deposit of each person as of the day fixed by the tax commission of Ohio for the listing of such deposits. Taxes assessed on the shares of stock of such an institution, all of whose shares are withdrawable and defined as deposits in chapter four of this title, shall be a lien on such shares so defined as deposits as of the day so fixed. It shall be the duty of every financial institution to pay the taxes on the amount of such deposits and/or withdrawable shares assessed in its name to the treasurer of state and any such institution failing to pay such taxes as herein provided shall be liable by way of penalty for the gross amount of the taxes due on and with respect to all its deposits and withdrawable shares assessed in its name and for an additional amount of one hundred dollars for every day of delay in the payment of such taxes." (115 O. L. 595, § 1)

§ 5673-2 *"Financial institution may deduct taxes from deposits, interests or dividends, how and when; lien; enforcement of lien.*

"A financial institution so required to pay to the treasurer of state the taxes assessed upon its deposit accounts, as taxable property of its depositors, and/or upon its withdrawable shares as taxable property of its shareholders respectively, as provided in the next preceding section, may, upon receipt of notice of the day fixed for the listing of such deposits, charge the amount thereof to and deduct the same from the deposit of each depositor, or from the interest that is due or thereafter becomes due thereon, or from the dividends that are due or thereafter become due thereon, as the case may be, and shall have a lien upon such deposit, interest and/or dividends and on all funds in its possession belonging to such depositor or shareholder, or which may at any time come into its possession, for reimbursement of the taxes so payable, with legal interest. Such lien may be enforced in any appropriate manner at any time within six months after the payment of the taxes to the treasurer." (115 O. L. 595, § 1)

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No. 220.

IN THE

Supreme Court of the United States

FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF WARREN,

Appellant,

vs.

STANLEY J. BOWERS (SUCCESSOR TO JOHN W. PECK), TAX COMMISSICNER OF OHIO,

Appellee.

BRIEF OF APPELLEE.

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Appellee.

BRIEF OF APPELLEE.

QUESTION PRESENTED AND STATEMENT OF THE CASE.

This case is a companion to *Society for Savings v. Peck, Tax Commissioner*, No. 204 on the docket of this court which is now pending. The cases were argued and briefed together in the lower court, and the opinion in this case

below relied on the opinion in the *Society for Savings* case, (R., 19.)

Appellee in this case relies on his brief filed herein in *Society for Savings v. Peck*, No. 204, October Term, 1954.

STATUTES INVOLVED.

In addition to the statutes contained in appellant's brief and in the briefs in the *Society for Savings* case, the following statutes are involved here:

Chapter 64, Section 5(a), 48 Stat., 132; Title 12, Section 1464(a), U.S.C.

> "In order to provide local mutual thrift institutions in which people may invest their funds and in order to provide for the financing of homes, the Board is authorized, under such rules and regulations as it may prescribe, to provide for the organization, incorporation, examination, operation, and regulation of association to be known as 'Federal Savings and Loan Associations,' and to issue charters therefor, giving primary consideration to the best practices of local mutual thrift and home financing institutions in the United States."

Chapter 64, Section 5(h), 48 Stat., 133-134; as amended Chapter 666, Title IX, Section 909, 53 Stat., 1402; and Chapter 521, Title III, Section 313(d), 65 Stat., 490; Title 12, Section 1464(h), U.S.C.

> "Such associations, including their franchises, capital, reserves, and surplus, and their loans and income, shall be exempt from all taxation now or hereafter imposed by the United States (except the taxes imposed by sections 1410 and 1600 of the Internal Revenue Code [26:1410, 1600] with respect to wages paid after December 31, 1939, for employment after such date, and except, in the case of taxable years beginning after December 31, 1951, income, war-profits, and excess-profits taxes), and all shares of such associa-

tions shall be exempt both as to their value and the income therefrom from all taxation (except surtaxes, estates, and inheritance, and gift taxes) now or hereafter imposed by the United States; and no State, Territorial, county, municipal, or local taxing authority shall impose any tax on such association or their franchise, capital, reserve, surplus, loans, or income greater than that imposed by such authority on other similar local mutual or cooperative thrift and home financing institutions."

ARGUMENT.

The new factor interposed in this case which is not present in the *Society for Savings* case, is the fact that this appellant is chartered under a federal statute. The reference in Title 12, Section 1464(a), supra, to "local mutual thrift institutions" and to their practices indicates the intention of Congress to set up mutual institutions of the conventional type. It is submitted that that also entails property interests of the kind set out in appellee's brief in the *Society for Savings* case.

Title 12, Section 1464(h) is set out to show that Congress has not purported to exempt any interest of the depositors or members from non-discriminatory state taxation.

It is therefore submitted that the principles discussed in the *Society for Savings* case should be applied here, and that the decision of the Supreme Court of Ohio should be affirmed.

Respectfully submitted,

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Attorneys for Appellee.

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In the Supreme Court of the United States

OCTOBER TERM, 1954

FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF WARREN, APPELLANT

v.

STANLEY J. BOWERS (SUCCESSOR TO JOHN W. PECK), TAX COMMISSIONER OF OHIO

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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OPINIONS BELOW

The entry of the Board of Tax Appeals, State of Ohio (R. 6-17), was not reported. The opinion of the Supreme Court of Ohio (R. 18-21) is reported at 161 O. S. 149.

JURISDICTION

The judgment of the Supreme Court of Ohio was entered on March 10, 1954. (R. 31.) An application for rehearing was seasonably filed and was denied by order dated March 31, 1954. (R. 31.) The petition for allowance of an appeal was allowed

June 23, 1954. (R. 4.) This Court, by order of October 14, 1954 (R. 56), noted probable jurisdiction. The jurisdiction of this Court to review the decision below by direct appeal is conferred by 28 U. S. C., Section 1257(2).

QUESTION PRESENTED

Whether the Ohio intangible property tax, which is measured by the capital, surplus or reserve fund, and undivided profits of incorporated savings and loan associations, is void as a tax upon obligations of the Federal Government, since no provision is made for deducting the value of these obligations held by the associations from the measure of the tax, and since the associations, which pay the tax, have no right to be reimbursed.

STATEMENT

Appellant, First Federal Savings and Loan Association of Warren (hereinafter referred to as the Association), is a federally incorporated savings and loan association doing business in Ohio. It issues so-called withdrawable shares to its depositors. (R. 37.) For tax purposes the Ohio statutes define these withdrawable shares as deposits, rather than as shares of capital stock. 4-A Page's Ohio General Code Annotated, Section 5324.

Ohio intangible property taxes totalling $5,702.72 were assessed against the Association annually from 1947 through 1951. (R. 17.) The tax was imposed upon the "capital employed, or the property representing it" in the institution. Ohio Code, Section 5408. It was computed by applying a rate of two mills per dollar against the aggregate of the

Association's capital, surplus or reserve fund, and undivided profits. Ohio Code, Section 5412. In computing this total, no deduction was made for United States Treasury obligations held by the bank among its assets. Had these obligations been deducted, no taxes would have been payable by the Association. (R. 17.)

The taxes were paid by the Association, which, pursuant to state law, then applied to the Tax Commissioner for a certificate abating the assessment. (R. 32-34.) This application was denied by order of the Tax Commissioner, dated July 30, 1952. (R. 34.) A notice of appeal to the Board of Tax Appeals was duly filed by the Association on August 27, 1952. (R. 35.) The Board, by entry dated March 2, 1953, reversed the order of the Tax Commissioner as to the taxes here involved, and remanded the cases with instructions to issue the certificate abating these taxes. (R. 6-17.) The Tax Commissioner appealed this portion of the entry to the Supreme Court of Ohio, which, on March 10, 1954, reversed the decision of the Board of Tax Appeals and affirmed the order of the Tax Commissioner. (R. 18-21.) The court held, one judge dissenting, that the tax was upon the intangible property interests held by the bank's depositors in its surplus, rather than on the bank itself. It, therefore, held the tax valid even though the federal obligations owned by the bank were not deducted from the measure of the tax. It relied for authority on the cases which permit a state to tax the full value of shares of stock in a corporation even though the corporation holds government obli-

gations among its assets. On May 27, 1954, pursuant to the Association's motion, Stanley J. Bowers was substituted as appellee. (R. 31.)

The Supreme Court of Ohio allowed the Association's petition for an appeal on June 23, 1954. (R. 4.) On October 14, 1954, this Court entered its order noting probable jurisdiction of the appeal and invited the Solicitor General to file a brief as *amicus curiae*. (R. 56.)

ARGUMENT

In deciding the issues raised on this appeal adversely to the Association, the Supreme Court of Ohio adopted by reference its opinion in the case of *Society for Savings in the City of Cleveland* v. *Stanley J. Bowers, Tax Commissioner of Ohio*, No. 204, this Term, relying on that opinion as the authority for its action. (R. 19) The Government has filed a brief as *amicus curiae* in that case and believes, for the reasons there stated, that the judgment of the Supreme Court of Ohio here appealed from should be reversed.

Respectfully submitted.

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